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## IN PRAISE OF ANTITRUST LITIGATION: THE SECOND ANNUAL BERNSTEIN LECTURE

STEPHEN CALKINS\*

It is an honor to serve as the second annual Bernstein lecturer.<sup>1</sup> Lew Bernstein was an antitrust legend. I had the privilege to learn from Mr. Bernstein as a student of trial practice many years ago, and it is a great privilege now to share some ideas as part of honoring his memory.

In preparing for today's remarks, I chatted with two long-time Antitrust Division colleagues of Mr. Bernstein, Bernard Hollander and Raymond Carlson. Both reveled in remembering their friend and inspirational leader.<sup>2</sup> Mr. Carlson used a modern comparison: "He was the best Michael Jordan-type lawyer that I've ever known." Mr. Bernstein was kind to everyone, Mr. Carlson continued: "He was *the* guy to work for in the Antitrust Division. I loved him, and I loved doing what I was doing. That was the best career that anyone could have had."

Careers in government antitrust agencies are different now.

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\* Professor of Law, Wayne State University Law School. Professor Calkins was General Counsel of the Federal Trade Commission when he delivered this address, which has been slightly revised for publication, but he was not speaking for the Commission or any individual Commissioner. Thanks for assistance go to Cynthia Hogue Levy and the several other lawyers in the FTC's Office of the General Counsel who helped prepare and revise the address, and to Michelle Fisher for additional research.

<sup>1</sup> It also is an honor to be introduced by Dean Rudolph Hasl, who taught me much about law school administration when I served a stint as an interim dean.

<sup>2</sup> Telephone Interview with Bernard Hollander (Apr. 1997); Telephone Interview with Raymond Carlson (Apr. 1997).

Lew Bernstein was an antitrust litigator; today, many agency antitrust lawyers are more antitrust regulators.<sup>3</sup> For instance, from 1960, when Mr. Bernstein became chief of the Antitrust Division's Special Litigation Section, through 1977 (when he retired) civil antitrust cases filed in the federal district courts averaged 43 a year,<sup>4</sup> as follows:

1960	1961	1962	1963	1964	1965	1966	1967	1968
59	40	41	39	41	33	32	36	40

1969	1970	1971	1972	1973	1974	1975	1976	1977
39	54	52	72	42	33	37	45	34

In the decade starting ten years later (1987-1996) the comparable average was only 16 cases<sup>5</sup>—roughly one-third of the volume during Lew Bernstein's tenure—with annual filings as follows:

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<sup>3</sup> See, e.g., Harry First, *Is Antitrust "Law"?*, 10 ANTITRUST 9, 9-10 (Fall 1995) (discussing the increased use of consent decrees under the current administration); James L. Freeze, *United States v. Western Electric Co.: The Deference Difference*, 21 CAP. U. L. REV. 321, 321 (1992) (indicating that the use of consent decrees has become the preferred means of disposing of antitrust litigation); David S. Konczal, *Ruining Rufo: Ramifications of a Lenient Standard for Modifying Antitrust Consent Decrees and an Alternative*, 65 GEO. WASH. L. REV. 130, 131 (1996); A. Douglas Melamed, *Antitrust: The New Regulation*, 10 ANTITRUST 13, 13 (Fall 1995) ("[T]he evolution of antitrust into a form of regulation is in part a by-product of the increasing use of consent decrees as the primary means of antitrust enforcement."); Stephen J. Squeri, *Government Investigation and Enforcement: Antitrust Division*, in 2 36TH ANN. ANTITRUST L. INST. 519, 564 (1995) (indicating roughly 70 percent of all Antitrust Division civil complaints are resolved by consent decree); Mary Lou Step-toe and David Balto, *The FTC's Use of Innovative Merger Remedies*, 10 ANTITRUST 16, 16 (Fall 1995) (noting a threefold increase in the number of consent decrees entered by the FTC since 1990); Michael L. Weiner, *Antitrust and the Rise of the Regulatory Consent Decree*, 10 ANTITRUST 4, 8 (Fall 1995) (noting the practical importance of the trend toward consent decree resolutions); see also *infra* note 4 and text accompanying note 5. Antitrust as regulation is also thoughtfully explored in a draft paper I received after largely completing this revision, Spencer Weber Waller, *Prosecution by Regulation: The Changing Nature of Antitrust Enforcement* (on file with author).

<sup>4</sup> These figures are based on fiscal year workload statistics (October 1 - September 30), supplied by the Department of Justice Antitrust Division ("DOJ"), Office of Legal Procedure. For more recent DOJ workload statistics, see 68 Antitrust & Trade Reg. Rep. (BNA) 146 (1995) (reporting data for FY 1985-1994); 70 Antitrust & Trade Reg. Rep. (BNA) 299 (1996) (reporting data for FY 1986-1995); 72 Antitrust & Trade Reg. Rep. (BNA) 117 (1997) (reporting data for FY 1987-1996).

<sup>5</sup> See *supra* note 4.

1987	1988	1989	1990	1991	1992	1993	1994	1995	1996
15	11	6	14	17	12	9	21	24	29

Although there has been a recent uptick, the overall decline is striking.

Litigation has received something of a bad name. It is tremendously costly for defendants and plaintiffs—including Government plaintiffs—alike. Partly as a result, consent decrees are now widely understood to be the likely outcome of government antitrust investigations that are not unilaterally terminated. In addition, Alternative Dispute Resolution (“ADR”) continues to be popular within the government and without.<sup>6</sup>

This trend is driven by more than mere economizing. Antitrust officials and observers increasingly recognize that mergers and other transactions can yield efficiencies likely to redound to the benefit of consumers, the general economy, and international competitiveness.<sup>7</sup> With certain exceptions, those same enforcers

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<sup>6</sup> See, e.g., Exec. Order No. 12,988, 61 Fed. Reg. 4729 (1996) (requiring government litigation counsel to make reasonable attempts to resolve disputes using alternative methods of resolving disputes); Exec. Order No. 12,778, 56 Fed. Reg. 55195 (1991) (same); Atty. Gen. Order No. OBD 1160.1, *Promoting the Broader Appropriate Use of Alternative Dispute Resolution Techniques* (Apr. 6, 1995) (establishing Alternative Dispute Resolution program in the Department of Justice to make the agency more efficient in its handling of roughly 170,000 civil justice matters each year); Peter Anderson, *Trends in Alternative Dispute Resolution since 1990: An ALI-ABA 50th Anniversary Special Article*, 8 PRAC. LITIGATOR 7, 8, 13 (1997) (describing acceptance of ADR methods by courts, clients, and the bar); Miriam R. Arfin, *The Benefits of Alternative Dispute Resolution in Intellectual Property Disputes*, 17 HASTINGS COMM. & ENT. L.J. 893, 896 n.8, 898-901 (1995) (stating that ADR is particularly well-suited to resolving intellectual property conflicts); Lois J. Schiffer & Robin L. Juni, *Alternative Dispute Resolution in the Department of Justice*, 11 NAT. RESOURCES & ENV'T 11, 11-12 (1996) (explaining how ADR is used in the Environmental Division, including the factors that make ADR useful in certain cases); Steven Schwartz, *The Business and Legal Communities Look to ADR*, 51 DISP. RESOL. J. 34 (1996) (discussing the use of ADR as a means to resolve disputes cheaper, faster, and more amicably); Peter R. Steenland, Jr. & Peter A. Appel, *The Ongoing Role of Alternative Dispute Resolution in Federal Government Litigation*, 27 U. TOL. L. REV. 805, 806 (1996) (stating that Attorney General Janet Reno recently “announced a policy of vigorously encouraging ADR within the Justice Department” by “creat[ing] the position of Senior Counsel for ADR within the Department”).

<sup>7</sup> See generally 1992 Horizontal Merger Guidelines, 4 Trade Reg. Rep. (CCH) ¶ 13,104 (1997) (revising efficiencies section of horizontal merger guidelines); Herbert Hovenkamp, *Merger Actions for Damages*, 35 HASTINGS L.J. 937, 942 (1984) (“Efficiency created by a merger generally increases social welfare.”). But see Alan A. Fisher & Robert H. Lande, *Efficiency Considerations in Merger Enforcement*, 71 CALIF. L. REV. 1582, 1603-04 (1983) (noting that although some mergers result in efficiencies, other mergers may not yield efficiencies, but, rather, higher overall

and observers are largely untroubled by increases in the size of firms.<sup>8</sup> If size by itself is not a matter of concern, and if mergers and other transactions are likely to yield substantial efficiencies, it follows easily that enforcers should work creatively with private counsel to preserve as much of the proposed transactions and arrangements as is consistent with preventing discrete, specific antitrust harm.<sup>9</sup> Much of merger enforcement is the surgical fine-tuning of proposed transactions to excise or isolate problematic parts while preserving as much as possible of the whole.<sup>10</sup>

The courtroom is a poor place to practice such surgery. It is settled law that once a violation has been proven, the preferred remedy is a complete injunction.<sup>11</sup> At best, however, a complete injunction risks losing whatever efficiency benefits a proposed transaction might have offered. Alternatively, the specter of de-

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costs).

<sup>8</sup> *Cf. e.g.,* Ciba-Geigy Ltd., C-3725 (Consent Order, Mar. 24, 1997), *reprinted in* 5 Trade Reg. Rep. (CCH) ¶ 24,182 (1997) (permitting a \$63 billion merger of two leading pharmaceutical and chemical firms pursuant to a consent agreement requiring, *inter alia*, the licensing of specified gene therapy technology and patent rights to a competitor and the divestiture of the acquirer's pet flea control and \$780 million corn herbicide businesses); *Baxter Int'l, Inc.*, C-3726 (Consent Order, Mar. 24, 1997), *reprinted in* 5 Trade Reg. Rep. (CCH) ¶ 24,184 (1996) (permitting a \$463 million acquisition when acquirer agreed to divest assets and license products under development; although the acquisition created the largest manufacturer of plasma products in the world); Adam Bryant, *McDonnell Douglas-Boeing Merger Wins F.T.C. Approval: FTC Says Deal Isn't Threat to Competitors*, N.Y. TIMES, July 2, 1997, at D-3; Steven Pearlstein, *Boeing Free to Purchase McDonnell*, WASH. POST, July 2, 1997, at A-1; John R. Wilke & Jeff Cole, *Boeing, McDonnell Douglas Deal Gains U.S. Antitrust Clearance*, WALL ST. J., July 2, 1997, at B-4 (discussing unconditional federal antitrust regulators' clearing of Boeing's planned \$14 billion acquisition of McDonnell Douglas).

<sup>9</sup> The connection between economic sophistication and an interest in consent decrees that makes government more regulatory is explicated in Melamed, *supra* note 3, at 15.

<sup>10</sup> See Steptoe & Balto, *supra* note 3, at 16. The Antitrust Division's March 1996 report, *Opening Markets and Protecting Competition for America's Businesses and Consumers: Goals and Achievements of the Antitrust Division*, U.S. Department of Justice (Mar. 27, 1996), detailed that of 60 mergers questioned by the Division since the start of fiscal year 1993, "27 were formally challenged by the Division in court, four of which were litigated, and 20 of which were restructured to alleviate the threat of competition. This high number of restructured transactions reflects the Division's practice, wherever possible, to resolve its competition concerns by agreeing with the parties on restructuring." *Id.* at 22.

<sup>11</sup> See *FTC v. PPG Indus., Inc.*, 798 F.2d 1500, 1502 (D.C. Cir. 1986) (finding that the trial court should have entered a preliminary injunction instead of a "hold separate order" when the agency established a strong likelihood of success on the merits of a Clayton Act Section 7 claim).

priving society of those benefits may dissuade a court from finding a violation in the first place, which (if an agency has chosen a case well) will likely lead to anticompetitive results. The all-or-nothing nature of litigation makes litigation cowards of us all.<sup>12</sup>

This is an occasion to celebrate the virtues of antitrust litigation rather than settlement, however.<sup>13</sup> In particular, three virtues of litigation stand out: (1) litigation is important because some judicial decisions are wrong; (2) litigation is important to the evolution of the law; and (3) litigation is important for certainty and predictability.

## I. LITIGATION IS IMPORTANT BECAUSE SOME DECISIONS ARE WRONG

Courts are judges; judges are people; and people make mistakes. Some judicial decisions are simply wrong. Although it may seem paradoxical, the certainty that courts will err is a reason to champion litigation.

### A. *Letting the Government Afford to Lose*

No responsible entity lightly files a lawsuit, and governmental entities can be among the most responsible. Governmental antitrust agencies should, and do, think long and hard before going to court.

In part, this care is simply good government. A court complaint represents a commitment of substantial agency resources. It also imposes costs on the defendant, the judicial system, and third parties; governmental officials should impose such costs with care. Any court complaint can roil the capital markets and prevent companies from engaging in normal activities that might benefit consumers. Governmental agencies also hesitate to litigate because of fear of defeat. Courtroom setbacks can demoralize agency staff, raise questions in the eyes of observers, and impose political costs. Few agency annual reports boast about the well-fought loss, and, in an era in which governmental accountability is fashionable, it is challenging to characterize losses as

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<sup>12</sup> Cf. WILLIAM SHAKESPEARE, *THE TRAGEDY OF HAMLET, PRINCE OF DENMARK*, act III, sc. i.

<sup>13</sup> For an appreciation of the Antitrust Division as an economic regulator, see E. Thomas Sullivan, *The Antitrust Division as a Regulatory Agency: An Enforcement Policy in Transition*, 64 WASH. U. L.Q. 997 (1986); see also *supra* note 3 and accompanying text.

accomplishments.<sup>14</sup>

All too often, agencies worry about their win rates. Legal newspapers regularly report the Solicitor General's success rate;<sup>15</sup> the Federal Trade Commission ("FTC") and the Antitrust Division of the Department of Justice boast about the rate at which merger challenges are successfully resolved;<sup>16</sup> and general counsels who are nominated for higher office like to claim that their agency won a high percentage of its cases.<sup>17</sup> Everyone wants a good batting average. Unfortunately, a single loss can ruin a good batting average compiled with few at-bats. It is one thing to lose one of many cases; it is considerably more devastating to lose a third, half, or more of one's cases. One advantage of regularly litigating is that the government can afford to lose.

Consider *FTC v. Butterworth Health Corp.*<sup>18</sup> That case involved the FTC's challenge to the proposed merger of the two largest (and, coincidentally, nonprofit) hospitals in Grand Rapids, Michigan.<sup>19</sup> The district court ruled in the Commission's favor on virtually every issue: product markets ("general acute

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<sup>14</sup> The Federal Trade Commission's Strategic Plan includes the goals of saving consumers \$1 billion by preventing anticompetitive mergers, 1997-2002, and of achieving "a positive result (including consent orders, litigation victories, and, for mergers, transactions abandoned after recommendation of a complaint) in at least 80% of those cases." *The FTC's strategic plan under the Government Performance and Results Act: FY 1997-2002* (June 1997) (visited Jan. 14, 1998) <<http://www.ftc.gov/opp/gprayny-011>>. "Each year" the agency is supposed to "assess the deterrence value and precedential significance of the enforcement actions brought during the year." *Id.*

<sup>15</sup> See, e.g., Tony Mauro, *Days' Rate; Solicitor General Has Subpar Season*, LEGAL TIMES, Sept. 4, 1995, at 1 (noting the 1994 term Solicitor General's win rate of 64% compared to 75% in the most recent term for which the office kept statistics (1992)).

<sup>16</sup> See, e.g., Commissioner Mary L. Azcuenaga, *Mergers: A View From the Federal Trade Commission, Remarks before the Practising Law Institute's 25th Annual Advanced Antitrust Seminar*, at 3 (Mar. 15, 1995) (visited Jan. 14, 1998) <<http://www.ftc.gov/speeches/azcuenaga/pli.htm>> ("This is a strong record that I believe speaks well for our case selection criteria and, of course, the considerable abilities of the Commission's litigating staff.").

<sup>17</sup> When Federal Communications Commission ("FCC") Chairman Hundt lauded the proposed elevation of FCC General Counsel William Kennard to Chairman, he boasted that "Bill has dramatically improved the agency's win record in the Court of Appeals." Statement by Chairman Hundt on Designation of William Kennard as Next Chairman of FCC (Aug. 6, 1997) (visited Jan. 14, 1998) <<http://www.fcc.gov/Speeches/Hundt/ken-reh.htm>>.

<sup>18</sup> 946 F. Supp. 1285 (W.D. Mich. 1996), *aff'd*, 121 F.3d 708 (6th Cir. 1997) (per curiam). Lest there be any doubt, I am a thoroughly biased observer of this litigation, since mine was the first name on all the briefs filed on the losing side.

<sup>19</sup> *Butterworth*, 946 F. Supp. at 1288.

care inpatient hospital services” and “primary care inpatient hospital services”);<sup>20</sup> geographic markets (“the Greater Kent County area” for general acute care inpatient hospital services, and “the ‘immediate Grand Rapids Area’ ” for primary care inpatient hospital services);<sup>21</sup> market concentration (the combined firms would control 47 to 65 percent of general acute care inpatient services, and 65-70 percent of primary care inpatient services);<sup>22</sup> and entry barriers (“defendants concede that there are substantial barriers to new entry into the relevant market”).<sup>23</sup> The court specifically concluded that the Commission had established a *prima facie* violation of Section 7,<sup>24</sup> and that “[t]here is no question but that the FTC has demonstrated that the merged entity would have substantial market power in two relevant markets.”<sup>25</sup>

In spite of this, the court denied the FTC’s request for a preliminary injunction.<sup>26</sup> The court pointed to a variety of factors, including especially “the involvement of prominent community and business leaders on the boards of these [nonprofit] hospitals”

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<sup>20</sup> *Id.* at 1291.

<sup>21</sup> *Id.* at 1291-93.

<sup>22</sup> *See id.* at 1294. There were four large general acute care hospitals in the geographic market pre-merger: (1) Butterworth Hospital (529 general acute care beds); (2) Blodgett Memorial Medical Center (328 general acute care beds); (3) St. Mary’s Hospital, a Catholic hospital (150 general acute care beds); and (4) Metropolitan Hospital, an osteopathic hospital (101 general acute care beds). *See id.* at 1288. Also included in the geographic market, though of lesser competitive significance due to their size and location, were five smaller hospitals, located in rural areas in counties adjoining Kent County, Michigan. *See id.* at 1291. The FTC argued that the merging hospitals would control 47-65% of the market for general acute care inpatient hospital services (*i.e.*, a cluster of services that are necessary to meet the needs of inpatients, such as operating rooms, anesthesia, intensive care capabilities, 24-hour nursing care, lodging, and pharmaceuticals) in the geographic market (depending on whether market share is measured by licensed beds, discharges or inpatient revenues). The post-merger Herfindahl-Hirschman Index (“HHI”) would range from 2767 to 4521, reflecting an increase of between 1064 and 1889 points. *See id.* at 1294. The agency further contended that the merged entity would control between 65 and 70% of a second product market, the market for primary care inpatient hospital services (*i.e.*, basic or less complex services available at most general acute care hospitals, including normal childbirth, gynecology, pediatrics, general medicine, and general surgical services). *See id.* “The post-merger HHI [in that market] would rise to a number between 4506 and 5079, reflecting an increase of from 1675 to 2001 points.” *Id.* The defendants did not contest these concentration calculations. *See id.*

<sup>23</sup> *Id.* at 1297.

<sup>24</sup> *See id.* at 1294.

<sup>25</sup> *Id.* at 1294, 1302.

<sup>26</sup> *See id.* at 1303.



and the hospitals' so-called "Community Commitment."<sup>27</sup> That "commitment" was repackaged as a court order that, among other things, froze hospital charges for three years, imposed a level reimbursement arrangement on the large health maintenance organizations, and limited hospital margins "in perpetuity" to the average of the top quartile nationally.<sup>28</sup> In addition, the court noted that, although it refrained from "engag[ing] in a detailed evaluation of the competing views" of efficiencies, it was persuaded that the merger would lead to unspecified efficiencies "in excess of \$100 million."<sup>29</sup> This amount would be "passed on to consumers" one way or another because "of defendants' nonprofit status and the Community Commitment,"<sup>30</sup> and it would "enable the board of directors ... to continue the quest for establishment of world-class health facilities in West Michigan, a course the Court finds clearly and unequivocally would ultimately be in the best interests of the consuming public as a whole."<sup>31</sup>

Trying my best to wear my objective law professor hat, this decision is, with all due respect, terribly misguided.<sup>32</sup> Although the court indicated that the nonprofit status was "not a dispositive consideration,"<sup>33</sup> the opinion could be misread to create an effective exemption for nonprofits. The court's faith in nonprofit leadership of the hospitals is strikingly evidenced by its observation that reduction of the hospitals' "above-average profit margins" would not advantage the public because profits are reinvested to benefit consumers.<sup>34</sup> If nonprofit status immunizes

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<sup>27</sup> *Id.* at 1297. The court found persuasive hospital service pricing data indicating that "high market concentration among nonprofit hospitals does not correlate positively with higher prices." *Id.* at 1295. The defendant hospitals offered evidence that higher hospital concentration is associated with lower hospital prices. The hospitals claimed that this called into question the traditional presumption that a significant increase in market concentration resulting from a merger will lead to higher prices, and the court was impressed. *See id.* at 1295-97. This Michigan resident cannot resist observing that the correlation seems more likely to result from the much higher costs of providing hospital services in Detroit, where there are several hospitals, than in the rural out-state regions of Michigan, where there are few.

<sup>28</sup> *Id.* at 1305-06 (Exhibit A).

<sup>29</sup> *Id.* at 1301.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 1302.

<sup>32</sup> The district court opinion is criticized in a new article, Thomas L. Greaney, *Night Landings on an Aircraft Carrier: Hospital Mergers and Antitrust Law*, 23 AM. J.L. & MED. 191, 212-14 (1997).

<sup>33</sup> *Butterworth*, 946 F. Supp. at 1297.

<sup>34</sup> *Id.* at 1299 ("With nonprofit hospitals ... reduced operating margins simply mean less funds to reinvest in each hospital. Such reinvestment necessarily results

hospitals from antitrust scrutiny, a full eighty-five percent of all hospitals have achieved an antitrust exemption without even petitioning Congress.<sup>35</sup> Beyond that, the court's only basis for entering the Community Commitment as a court order must have been that it found a violation; but then, having found a violation, the remedy was court-ordered perpetual rate regulation rather than the traditional remedies under the Clayton Act, *viz.*, enjoining the merger or requiring the divestiture of assets to mitigate any anticompetitive effects from the merger.<sup>36</sup> If any lesson has been well-learned by economists and even politicians, it is that regulation is a poor substitute for competition; yet, here, the court was establishing itself as a small regulatory body without any statutory support for doing so. Any hope that the court would be a singularly effective rate regulator was belied by the court's initial decree, which directly lessened competition by ending discounts to certain managed care plans and by freezing rates when further decreases seemed quite possible.

Although *Butterworth* was a singularly misguided opinion, the decision to appeal it was not without risk. An unfavorable but unaffirmed district court opinion is merely that; an affirmed opinion is stronger—and there was risk that a court of appeals could adopt some of the lower court's reasoning as its own. A private litigant, and particularly one not regularly involved in litigation, may weigh the chance of winning against legal fees. A government agency must also consider the likely development of the law, particularly if this would be one of very few opinions.

In the end the Commission did appeal *Butterworth*, and a seemingly disinterested United States Court of Appeals for the Sixth Circuit affirmed the district court in an unpublished per curiam opinion.<sup>37</sup> The court did little more than add an appellate expression of non-objection to the district court's decision. Nonetheless, the state of hospital merger law is worse than it was before the FTC brought its case, and worse than it would have been

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in benefits to consumers in the form of expanded and improved services.”).

<sup>35</sup> See *Demise of the Not-For-Profit has been Greatly Exaggerated*, MOD. HEALTHCARE Dec. 23-30, 1996, at 33.

<sup>36</sup> One irony lost on the court was that the efficiency justification was grounded on the view that the merger was the only way to prevent a “medical arms race” that would “continue[] at great expense to defendants and ultimately to consumers.” *Butterworth*, 946 F. Supp. at 1301. The combatants in this wasteful arms race were, of course, the same public-spirited guardians against wasteful practices in whom the court showed such confidence.

<sup>37</sup> See *FTC v. Butterworth Health Corp.*, 121 F.3d 708 (6th Cir. 1997).

had the FTC not appealed.<sup>38</sup> The hospitals' lawyer explained that the courts had concluded that "[j]ust because there's an increase in market power doesn't mean the market power will be exercised,"<sup>39</sup> yet if the FTC, having shown that a merger will significantly increase market power, is not entitled to a preliminary injunction, the standard for awarding a preliminary injunction has been dramatically raised.<sup>40</sup> I personally wish that the Commission had sought certiorari, in case it could interest the Supreme Court in righting this rather clear wrong, but the Commission declined to do so.<sup>41</sup>

One cannot know the cost of the unhappy *Butterworth* story without knowing whether it will turn out to be merely one of a

<sup>38</sup> Hospitals are reportedly already mimicking the "Community Commitment" in attempts to use a price-regulation approach to substitute for competition. See *Government's Prognosis for Future Health Care Mergers*, FTC: WATCH No. 486, at 1, 3 (Oct. 13, 1997) (merging hospitals in Erie, Pennsylvania, are touting " 'Our Commitment to the Community' ... which closely tracks the Butterworth/Blodgett commitment that so impressed the federal district court judge in that case").

<sup>39</sup> *FTC'S Failure to Halt Grand Rapids Hospital Merger Won't Be Overturned*, 73 Antitrust & Trade Reg. Rep. (BNA) 49, 50 (July 17, 1997) (remarks of William G. Kopit).

<sup>40</sup> It used to be settled law that the FTC was entitled to a preliminary injunction whenever it had "raise[d] 'questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals.' " *FTC v. National Tea Co.*, 603 F.2d 694, 698 (8th Cir. 1979) (quoting and endorsing magistrate). Although the *Butterworth* court purported to apply this standard, its decision strips the standard of all meaning.

<sup>41</sup> Not only did the Commission not seek certiorari, it dismissed its pending administrative case reviewing the same merger. The Commission gave no explanation for its decision, but merely quoted the applicable standards. 5 Trade Reg. Rep. (CCH) ¶ 24,334, at 24,168 (Sept. 25, 1997) ("After considering the pleadings and each of these five factors, the Commission has determined that further administrative litigation is not in the public interest."). Press reports speculate that the Commission acted in response to Congressional pressure:

It didn't help the federal government's case that Amway, one of the city's largest employers, stood firmly behind the merger. Amway's retired co-founder Richard DeVos, also former Chairman of the Board at Butterworth, reportedly played a key role in the creation of a Senate appropriations rider that, if enacted, would have prohibited the Federal Trade Commission from continuing to challenge the merger.

*Government's Prognosis for Future Health Care Mergers*, FTC: WATCH No. 486, at 2 (Oct. 13, 1997); *Butterworth/Blodgett Hospital Merger Challenge Dropped*, FTC: WATCH No. 485 (Sept. 29, 1997) (noting "Congressional unhappiness"); cf. *Senate Judiciary Panel Members Oppose Rider on FTC Review of Hospital Merger*, 73 Antitrust & Trade Reg. Rep. (BNA) 307 (Sept. 25, 1997) (S. 1022, passed by the Senate, would have prevented the FTC from using appropriate funds to continue the administrative adjudication of the Butterworth-Blodgett hospital merger).

series of cases wrestling with hospital merger issues, or, rather, one of only a handful. When a particular wrongly-decided appellate opinion is just one of many opinions addressing an issue, the cost of defeat may be modest. Where, however, an appellate defeat might be the only opinion to address an issue for years to come, the risks are much higher. A series of cases creates opportunities to file appeals that an agency otherwise might not dare, and, of course, to file somewhat risky but meritorious cases in the first place.

### *B. Burying Cases in the Sands of Time*

Law students sometimes have a vision of the legal system as a process by which firm principles are established in cases that endure until squarely reversed or clearly limited. Happily, the real world does not work that way. Instead, judicial mistakes can be buried by passage of time. Thus, extensive litigation, most of which presumably will have correct outcomes, can serve to dilute the impact of wrongly-decided cases. Three examples illustrate the point:

#### 1. *Von's Grocery*<sup>42</sup>

*Von's Grocery* was the case that condemned a merger between the third and sixth largest retail grocery chains in a metropolitan area, a merger that would have resulted in a combined market share of only seven and one-half percent. In reversing the lower court's denial of the Government's motion to enjoin the merger, the Court expressed alarm at the continuing trend toward increased concentration in the Los Angeles grocery store market.<sup>43</sup> Commentators have fatally undermined the precedential value of *Von's Grocery* by mocking its undue concern for " 'small dealers and worthy men' "<sup>44</sup> and, alternatively, its failure actually to serve their interests.<sup>45</sup>

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<sup>42</sup> United States v. *Von's Grocery Co.*, 384 U.S. 270 (1966).

<sup>43</sup> See *id.* at 276.

<sup>44</sup> *Id.* at 274 (quoting United States v. *Trans-Missouri Freight Ass'n*, 166 U.S. 290, 323 (1897)).

<sup>45</sup> See, e.g., ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 198-218 (1978); HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* 451-52 (1994). Judge Bork attacked both *Von's Grocery* and *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962). The Court in *Brown Shoe* relied heavily on the legislative history of the 1950 Celler-Kefauver Amendments to Section 7 of the Clayton Act, which suggested that Congress may

The decision in *Von's Grocery* was handed down thirty years ago, and since then, the Court has never reversed nor even expressly limited it. Yet neither courts nor antitrust practitioners view it as good law today. The change was accomplished by the steady accretion of cases inconsistent with *Von's Grocery*.<sup>46</sup> Eventually, so many lower courts had ignored *Von's Grocery* that antitrust advisors became comfortable also ignoring it.<sup>47</sup>

Those more recent cases built on the more sophisticated competitive analysis that has evolved in antitrust case law over the intervening years. The evolution was triggered or at least propelled forward by the 1982 Merger Guideline revisions led by Assistant Attorney General William Baxter. In a masterstroke, General Baxter switched from traditional four-firm concentration ratios<sup>48</sup> to the Herfindahl-Hirschman Index.<sup>49</sup> Since the

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have been more concerned with the welfare of small businesses and with an alleged "rising tide of concentration" in many American markets than it was with specific consumer prices. See, e.g., 96 CONG. REC. 1643-45 (1950) (remarks of Senator O'Mahoney); 95 CONG. REC. 11496 (1949) (remarks of Representative Boggs); see also Derek Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 234 (1960); Herbert Hovenkamp, *Derek Bok and the Merger of Law and Economics*, 21 J.L. REFORM 515 (1988); Herbert Hovenkamp, *Distributive Justice and the Antitrust Laws*, 51 GEO. WASH. L. REV. 23-27 (1982).

<sup>46</sup> See, e.g., *Hospital Corp. of Am. v. FTC*, 807 F.2d 1381, 1386 (7th Cir. 1986); *Lunkenheimer Co. v. Condec Corp.*, 268 F. Supp. 667, 671 (S.D.N.Y. 1967) (upholding a merger with combined shares of less than 5% in unconcentrated bronze valve market, with no showing of high entry barriers; distinguishing *Von's Grocery* as emphasizing accelerating concentration).

The most important developments that cast doubt ... on *Brown Shoe* and *Von's Grocery*, [370 U.S. 294 (1962)] are found in other cases, where the Supreme Court, echoed by lower courts, has said repeatedly that the economic concept of competition, rather than any desire to preserve rivals as such, is the lodestar that shall guide the contemporary application of the antitrust laws, not excluding the Clayton Act.

*Hospital Corp.*, 807 F.2d at 1386. Although the Supreme Court has never reversed *Von's Grocery*, its opinions in *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974) (sustaining merger in spite of facially high market shares), and *Cargill, Inc. v. Montfort of Colo., Inc.*, 479 U.S. 104, 116 n.11 (1986) (noting "considerable disagreement" about whether "Congress intended the courts to apply § 7 so as to keep small competitors in business at the expense of efficiency"), gave comfort to those who rejected *Von's Grocery*.

<sup>47</sup> ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 326-27 (4th ed. 1997) [hereinafter "1997 ANTITRUST LAW DEVELOPMENTS"] (more recent decisions have based presumptions of illegality on "very high" market shares, and "[c]ourts have been more receptive than in the past to non-market share evidence").

<sup>48</sup> Concentration ratios measure the portion of the market accounted for by a given number of the leading firms (e.g., the top two, four, or eight firms). Four-firm concentration ratios were used in the Department of Justice's 1968 Guidelines to identify threshold concentration levels that were likely to result in an enforcement

Guidelines supplied the only yardstick with which to identify troubling concentration patterns, courts were compelled to compare the concentration figures from litigated cases to the Guidelines' thresholds—a comparison which, among other things, served to isolate *Von's Grocery* and similar cases.<sup>50</sup>

## 2. *Utah Pie*<sup>51</sup>

*Utah Pie* applied the Robinson-Patman Act to strike down price discrimination that led to a "deteriorating price structure."<sup>52</sup> In *Utah Pie*, the Court condemned the pricing activities of three wholesale pie baking companies that operated in several geographic markets. There was an intense price war in the Salt Lake City area (the market in which the small plaintiff operated) and the defendants sold pies at lower prices than they sold the same pies in other cities. The plaintiff made a profit throughout the entire time period that was at issue in the litigation,<sup>53</sup> and always had a market share greater than that of any of the three

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action.

<sup>49</sup> The Herfindahl-Hirschman Index ("HHI") is calculated by summing the squares of the individual market shares of all the firms included in the relevant market. Unlike traditional concentration ratios, the HHI includes the shares of all firms in the market, while assigning little significance to small shares. The HHI also emphasizes the asymmetry in the size distribution of the firms in the market. "The HHI is premised upon the economic principle that both the distribution of market shares among the leading firms and the composition of the market outside the leading firms are significant in assessing the likelihood of tacit collusion or interdependent, noncompetitive conduct in a market." FTC v. Bass Bros. Enters., 1984-1 Trade Cas. (CCH) ¶ 66,041, at 68,609 (N.D. Ohio 1984).

<sup>50</sup> See generally Stephen Calkins, *The New Merger Guidelines and the Herfindahl-Hirschman Index*, 71 CALIF. L. REV. 402, 410-15 (1983) (discussing the use of HHI by courts). Current merger policy with respect to efficiency, moreover, has moved away from the concerns expressed in the legislative history of the 1950 amendments to Section 7 of the Clayton Act and from the early Supreme Court decisions interpreting those amendments. See 1992 Horizontal Merger Guidelines, 4 Trade Reg. Rep. (CCH) ¶ 13,104 (1997) (revising the efficiencies section of horizontal merger guidelines).

<sup>51</sup> *Utah Pie Corp. v. Continental Baking Co.*, 386 U.S. 685 (1967).

<sup>52</sup> *Id.* at 690. The case also involved a conspiracy charge; however, the jury did not find a Sherman Act violation. The jury in *Utah Pie* did find a Robinson-Patman violation, but the Tenth Circuit Court of Appeals reversed, finding insufficient evidence that the geographic price discriminations could have caused the requisite injury to competition. *Continental Baking Co. v. Utah Pie Corp.*, 349 F.2d 122, 150-53, 155 (10th Cir. 1965). The Robinson-Patman Section 2(a) claim was before the Supreme Court. See *Utah Pie*, 386 U.S. at 687-88. The Court reversed and remanded. See *id.* at 704.

<sup>53</sup> The Court of Appeals placed heavy emphasis on this fact. See *Utah Pie*, 349 F.2d at 129.

defendants. Nonetheless, the Court cited a "drastically declining price structure"<sup>54</sup> as evidence of defendants' predation.<sup>55</sup> The Robinson-Patman Act was thus used to condemn healthy competition by multi-market sellers.

Even before the Supreme Court revisited Robinson-Patman Act standards for competitive injury more than 25 years later, in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*,<sup>56</sup> *Utah Pie* had been sapped of its precedential vitality. Once again a guideline played a key role in this process, this time through a standard propounded by Professors Areeda and Turner.<sup>57</sup> They criticized *Utah Pie* as condemning pro-competitive price-cutting,<sup>58</sup> and advocated cost-based pricing tests. Even without much assistance from the Supreme Court,<sup>59</sup> a bumper crop of lower court predatory pricing decisions pledged allegiance to some form of the cost-based pricing gospel. Legal advisors eventually became comfortably confident that *Utah Pie* was no longer good law.<sup>60</sup> Once again, so many cases had ignored a wrongly-decided precedent that it was eliminated in effect if not reversed in fact.

### 3. *Appalachian Coals*<sup>61</sup>

*Appalachian Coals* was the depression-era case that could be read as substantially cutting back on Sherman Act coverage of price-fixing. In *Appalachian Coals*, 137 competing coal producers created an exclusive joint selling agency which was instructed to sell all of the members' coal at the highest price that it was able to obtain. The agency classified the coal, marketed it, and distributed the proceeds to the participants. Because coal is

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<sup>54</sup> *Utah Pie*, 386 U.S. at 703.

<sup>55</sup> *See id.* at 690.

<sup>56</sup> 509 U.S. 209 (1993).

<sup>57</sup> *See* Phillip Areeda & Donald F. Turner, *Predatory Pricing and Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975).

<sup>58</sup> *See id.* at 728.

<sup>59</sup> The Court's next foray into predatory pricing, *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), mentioned *Utah Pie* only as a strained "see" cite to support the footnoted proposition that " 'predatory pricing' means pricing below some appropriate measure of cost." *Matsushita*, 475 U.S. at 584-85 n.8.

<sup>60</sup> *See* ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 232-33 (2d ed. 1984) [hereinafter "1984 ANTITRUST LAW DEVELOPMENTS"] ("Lower court decisions since *Utah Pie* have focused principally on whether the price is 'below cost' ....").

<sup>61</sup> *Appalachian Coals Inc. v. United States*, 288 U.S. 344 (1933).

fungible, the agency necessarily charged the same price for each producer's coal, and effectively fixed prices. The Court upheld the joint endeavor, holding that the depressed market conditions justified the joint sales activities, and that there appeared to be little likelihood that the coal producers were reducing output and obtaining higher prices. Commentators criticized the Court's opinion as ignoring economic reality and responding too strongly to depression-era concerns.<sup>62</sup> Although the Supreme Court never squarely reversed the decision,<sup>63</sup> observers came to view *Appalachian Coals*—at least in its own terms<sup>64</sup>—as a relic of a special time in America's history.<sup>65</sup> It became a relic only because a whole series of cases treated it as one.

By itself, the passage of time can raise questions about the continued vitality of aged precedents. By itself, however, time can only raise doubts. If the Supreme Court is not going to reverse itself, only a series of lower court decisions, working together, can give unhappy opinions the proper burial they deserve.

### C. *Wrong-Headed Cases Attract Criticism*

Wrong decisions in litigated cases attract criticism, which can lead to the undoing of an ill-advised principle. As Chief Justice Stone wrote, "the only protection against unwise decisions, and even judicial usurpation, is careful scrutiny of their action and fearless comment upon it."<sup>66</sup> Criticism can be leveled

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<sup>62</sup> See generally PHILLIP AREEDA & LOUIS KAPLOW, *ANTITRUST ANALYSIS* 190 (5th ed. 1997) ("*Appalachian Coals* is often regarded today as an aberration of the 1930s, when competition was often deemphasized."); RICHARD A. POSNER & FRANK H. EASTERBROOK, *ANTITRUST* 126 (2d ed. 1981) (explaining that the outcome in *Appalachian Coals* was because faith in policy of competition during the depression era was "deeply shaken"); John J. Flynn & James F. Ponsoldt, *Legal Reasoning and the Jurisprudence of Vertical Restraints: The Limitations of Neoclassical Economic Analysis in the Resolution of Antitrust Disputes*, 62 N.Y.U. L. REV. 1125, 1128 n.11 (1987).

<sup>63</sup> Cf. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 214 (1940) (*Appalachian Coals* "is not in point").

<sup>64</sup> For ruminations about whether the decision can be rationalized with modern joint venture analysis through an approach different than the courts, see, e.g., HOVENKAMP, *supra* note 45, at 188; STEPHEN F. ROSS, *PRINCIPLES OF ANTITRUST LAW* 132-33 (1993).

<sup>65</sup> See *supra* note 62 and accompanying text. But cf. *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 585 F.2d 821, 838 (7th Cir. 1978) (*Appalachian Coals* relied upon to uphold national accounts program).

<sup>66</sup> 1960 SUP. CT. REV. ii. Starting two years later, the Supreme Court Review



in dissents and in academic commentary.

Antitrust's most famous dissent was Justice Stewart's in *Von's Grocery*, where he wrote that the "sole consistency" that he could find among a line of cases "is that in litigation under § 7, the Government always wins."<sup>67</sup> *Von's* was on shaky ground from its date of issuance.

Litigated decisions also attract academic comment and attack. *Utah Pie*, which is mentioned above, was savagely criticized by Ward Bowman, who labeled it "the most anticompetitive antitrust decision of the decade" (which he added was "no mean achievement").<sup>68</sup>

The Supreme Court shows a growing determination in its antitrust decisions to convert laws designed to promote competition into laws which regulate or hamper the competitive process. Succeeding interpretations of the Clayton and Robinson-Patman Acts—and, by infectious contamination, the Sherman Act—demonstrate an increasingly apparent disregard for the central purpose of antitrust, the promotion of consumer welfare through the promotion of a competitive market process. Now, in *Utah Pie Co. v. Continental Baking Co.*, the Supreme Court has used section 2(a) of the Robinson-Patman Act to strike directly at price competition itself.<sup>69</sup>

From the moment Professor Bowman published his brutal assault on *Utah Pie*, it was vulnerable. Later, Professors Areeda and Turner contributed their bright-line alternative, and *Utah Pie* was largely consigned to history. Eventually, the Supreme Court ratified the alternative view. Noting the extensive criti-

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switched to a similar sentiment expressed by Justice Felix Frankfurter: "Judges as persons, or courts as institutions, are entitled to no greater immunity from criticism than other persons or institutions .... [J]udges must be kept mindful of their limitations and of their ultimate public responsibility by a vigorous stream of criticism expressed with candor however blunt." 1962 SUP. CT. REV. ii; 1996 SUP. CT. REV. ii. Both admonitions were paired with a cautionary word from Judge Learned Hand: "while it is proper that people should find fault when their judges fail, it is only reasonable that they should recognize the difficulties .... Let them be severely brought to book, when they go wrong, but by those who will take the trouble to understand them." 1960 SUP. CT. REV. ii; 1962 SUP. CT. REV. ii; 1996 SUP. CT. REV. ii.

<sup>67</sup> *United States v. Von's Grocery Co.*, 384 U.S. 270, 301 (1966) (Stewart, J., dissenting).

<sup>68</sup> Ward S. Bowman, *Restraint of Trade by the Supreme Court: The Utah Pie Case*, 77 YALE L.J. 70, 84-85 (1967). Bowman also lamented *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966), *FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967), and *FTC v. Consolidated Foods Corp.*, 380 U.S. 592 (1965).

<sup>69</sup> *Id.* at 70 (footnotes omitted).

cism of *Utah Pie*, the Court in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*<sup>70</sup> explained away the case as “an early judicial inquiry” that “did not purport to set forth explicit, general standards for establishing a violation of the Robinson-Patman Act.”<sup>71</sup>

The Supreme Court’s 1967 opinion in *United States v. Arnold, Schwinn & Co.*<sup>72</sup> is another familiar example. Until the Court overruled its decision ten years later, *Schwinn* was the leading opinion addressing restricted distribution. The Court adopted a sharp line of illegality: “Under the Sherman Act, it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it.”<sup>73</sup> The Court applied this test to condemn the imposition of restraints on distributors’ and retailers’ rights to dispose of purchased products, while upholding *Schwinn*’s territorial and customer restrictions in consignment and agency arrangements whereby the manufacturer retained title and risk of loss of its products.<sup>74</sup>

*Schwinn* was dissected and rejected by a host of commentators. A leading critic was Donald Baker, a former Assistant Attorney General in charge of the Antitrust Division:

What is wrong with Justice Fortas’ *Schwinn* decision is that it is an exercise in barren formalism. It has (to borrow another of Justice Fortas’ phrases) a “strange red-haired, bearded, one-eyed man-with-a-limp” quality. It is artificial and unresponsive to the competitive needs of the real world. An even cursory look at the case itself makes clear that what we have is unsound antitrust policy.<sup>75</sup>

When the Court reversed itself in *Continental T.V., Inc. v. GTE Sylvania Inc.*,<sup>76</sup> it observed that *Schwinn* had been the subject of continuing controversy in the scholarly journals.<sup>77</sup>

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<sup>70</sup> 509 U.S. 209 (1993).

<sup>71</sup> *Id.* at 221.

<sup>72</sup> 388 U.S. 365 (1967), overruled by *Continental T.V. Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

<sup>73</sup> *Id.* at 379.

<sup>74</sup> *See id.* at 377-78.

<sup>75</sup> Donald I. Baker, *Vertical Restraints in Times of Change: From White to Schwinn to Where?*, 44 ANTITRUST L.J. 537, 537 (1975) (citation omitted).

<sup>76</sup> 433 U.S. 36 (1977).

<sup>77</sup> *Id.* at 48, 49 nn.13-14 (citing roughly a dozen law review articles, including Baker’s, debating the partial per se approach announced in *Schwinn*, and a host of

"The great weight of scholarly opinion has been critical of the decision ... ."<sup>78</sup>

By their very nature, consent orders attract much less scrutiny than do court opinions. A court opinion is binding precedent that cries out for attention by scholars and other tribunals. A good opinion describes the facts, applies applicable legal standards, and elucidates the reasoning that drives the decision. A judge is subject to the sobering requirement to announce a winner and a loser, and to justify his or her action in terms that speak to the litigants and also to the legal community.

Consent orders are merely compromises. Complaints accompanying orders set forth some facts, but rarely with the thoroughness and impartiality of a good judge issuing a published opinion. Government staff commentary accompanying consent orders explain the rationale of the decision to settle,<sup>79</sup> but rarely with the kind of candor and comprehensiveness that one would expect of a judicial opinion. At best, outsiders gain an understanding of agency views of an issue in situations where potential defendants have been willing to acquiesce in an agreement for some undisclosed mix of reasons.

In this regard, observers are sometimes better served by a collegial body such as the FTC than a single-headed agency such as the Antitrust Division. Commissioners can signal the strength of their support for particular consent orders by recording votes and publishing dissents, concurrences, and responses. At times, a consent order may trigger a public exchange of views that can highlight areas where Commissioners (and likely others) disagree. For example, over the past few years, the Commission has initiated several enforcement actions resulting in consent orders settling charges that various respondents have engaged in illegal resale price maintenance ("RPM").<sup>80</sup> The most

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federal court cases that had struggled to distinguish or limit *Schwinn* in ways that "are a tribute to judicial ingenuity" (quoting Stanley D. Robinson, *Recent Antitrust Developments: 1974*, 75 COLUM. L. REV. 243, 272 n.13 (1975)).

<sup>78</sup> *Id.* at 48.

<sup>79</sup> The Tunney Act requires the Justice Department to file a "Competitive Impact Statement" and to make available to interested parties "determinative" materials considered by the department, 15 U.S.C. § 16(b) (1994), and the Federal Trade Commission publishes a non-binding "analysis to aid public comment" with its proposed complaints and orders.

<sup>80</sup> See *American Cyanamid Co.*, (Consent Order May 12, 1997) (C-3739) (resulting in three separate statements of commissioners), summarized in 5 Trade Reg. Rep. (CCH) ¶ 24,203 (1997) (proposed consent agreement); *New Balance Ath-*

recent of this series of cases, *American Cyanamid*, involved charges that the company fixed the resale prices of its agricultural chemical products by offering substantial rebates to its retail dealers on the condition that the dealers sold the company's chemicals at or above specific prices.<sup>81</sup> The merits of the proposed consent order are vigorously debated in majority and dissenting statements, such that it is obvious to anyone reading the exchange of views that this was a case about which there was considerable controversy.<sup>82</sup> The same consent order, if entered by the Antitrust Division, might not have advertised its status.

Even at the FTC, however, consent orders reveal the

letic Shoe, Inc., (Consent Order Sept. 10, 1996) (C-3683) (4-1 vote with separate concurring and dissenting statements issued by 2 commissioners), *summarized in* 5 Trade Reg. Rep. (CCH) ¶ 24,048 (1996) (proposed consent agreement); Reebok Int'l, Ltd., (Consent Order July 18, 1995) (C-3592) (4-1 vote with one dissenting statement), *summarized in* 5 Trade Reg. Rep. (CCH) ¶ 23,813 (1995) (proposed consent agreement); Keds Corp., (Consent Order Apr. 1, 1994) (C-3490), *summarized in* 5 Trade Reg. Rep. (CCH) ¶ 23,463 (proposed consent agreement); Nintendo of Am., Inc., (Consent Order Nov. 14, 1991) (C-3350), *summarized in* [1987-1993 Transfer Binder] *FTC Complaints & Orders* (CCH) ¶ 22,968 (proposed consent agreement); Kreepy Krauly, U.S.A., Inc., (Consent Order Dec. 20, 1991) (C-3354), *summarized in* [1987-1993 Transfer Binder] *FTC Complaints & Orders* (CCH) ¶ 22,924 (proposed consent agreement).

<sup>81</sup> The complaint alleged that the company maintained two rebate programs for its retail dealers for a period spanning roughly 5 years. Under these programs, the company entered into written agreements with its dealers whereby it would pay the dealers substantial rebates on each sale if the dealers sold the crop protection chemicals at or above specified minimum resale prices. The pre-rebate prices paid by the dealers for the crop protection chemicals were equal to the specified minimum resale prices. Thus, under the terms of these agreements, a dealer was not entitled to, and did not receive, any rebate on sales that were made below the specified minimum price. Any sales by the dealers below the company's specified minimum resale prices were made at a loss to the dealer. *American Cyanamid*, 5 Trade Reg. Rep. (CCH) ¶ 24,009.

<sup>82</sup> When the Commission voted 4-1 to accept the proposed consent order, the Commission majority's views were set out in an Analysis to Aid Public Comment. *See In re American Cyanamid Co.*, No. 951-0106 (Jan. 30, 1997) (visited Jan. 28, 1998) <<http://www.ftc.gov/os/9701/amercyan.htm>>. Commissioner Starek issued a lengthy dissent in which he accused the majority of seeking "to circumvent the law of RPM ... laid down by the Supreme Court over the last twenty years." *Id.* (dissenting statement of Commissioner Roscoe B. Starek, III). Three members of the majority responded in a statement of their own. *See id.* (statements of Chairman Robert Pitofsky and Commissioners Janet D. Steiger and Christine A. Varney). Commissioner Mary L. Azcuenaga declined to join either statement, preferring to let the complaint and consent order speak for themselves. *See id.* (concurring statement of Commissioner Mary L. Azcuenaga). Three similar separate statements also accompanied the Commission's issuance of the complaint and consent order in final form on May 12, 1997. *American Cyanamid* is further discussed *infra* at notes 137-45 and accompanying text.

agency's views only dimly. Cases may be settled because of resource concerns, because the evidence is shaky, because the law is uncertain, because ample relief has been achieved, or for other reasons. It would be surprising were an agency ever to be entirely forthcoming about its thinking (and even the most forthcoming of collegial bodies may have a rainbow of views). Similarly, defendants may settle entirely unmeritorious cases solely to save resources, or to avoid risking disclosure of unrelated secrets, or because the remedy is innocuous. Settlements may be based on such an array of secret considerations that it is exceedingly difficult to draw firm lessons from them.<sup>83</sup>

Given all this, it is not surprising that settlements draw much less academic scrutiny than leading judicial decisions.<sup>84</sup> A commentator can read a published opinion, form a view as to its merits, and know that the opinion may matter because it is binding precedent. That same commentator would be hard-pressed to be confident about whether or not a settlement was wise, and, since the settlement is not precedent, it is of much

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<sup>83</sup> See Robert F. Leibenluft, *Government Enforcement and Guidance in Health Care Antitrust: Maintaining the Balance* (visited Jan. 13, 1998) <<http://www.ftc.gov/speeches/other/aba897.htm>>:

I urge you to exercise caution in using a consent order as a specific guide to conduct by persons not covered by the order. Orders should be read in context .... [M]oreover, order provisions should not be read as a strict "cookbook" guide to conduct. In many cases, the order language may be more restrictive than what the law requires of others; in a few cases, following the letter of an order may not shield conduct that in a different context could violate the law.

*Id.*

One of the best efforts to synthesize antitrust principles unmoored to case law (and to express frustration at the difficulty of doing so) is Richard M. Steuer, *Counseling Without Case Law*, 63 ANTITRUST L.J. 823 (1995). For a perspective worrying that government agencies are using consent orders to move legal standards ahead of what case law supports, see Weiner, *supra* note 3.

<sup>84</sup> For a notable counter-example, see the symposium on the Antitrust Division's then-proposed settlement, which (at the time) was under active review in the courts. Symposium: *Microsoft and the United States Department of Justice*, 40 ANTITRUST BULL. 257 (1995); see also Deborah A. Garza, *The Court of Appeals Sets Strict Limits on Tunney Act Review: The Microsoft Consent Decree*, 10 ANTITRUST No. 1, at 21 (Fall 1995). Two of the few previous consent orders subject to significant scholarly analysis—the AT&T decree, *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.*, *Maryland v. United States*, 460 U.S. 1001 (1983), and the FTC decree blessing the GM-Toyota joint venture—are reviewed, along with ten litigated orders, in *THE ANTITRUST REVOLUTION* (John E. Kwoka, Jr. & Lawrence J. White eds., 1979); see also ROBERT W. CRANDALL, *AFTER THE BREAKUP: U.S. TELECOMMUNICATIONS IN A MORE COMPETITIVE ERA* (1991).

less obvious importance to the development of the law. There is a sense that nothing to which parties have agreed can be too objectionable; yet, in important ways, agencies can use consent orders to signal views and even shape the rules by which private firms operate. The process works smoothly, in part, because there is relatively little second-guessing; for that same reason, however, the evolution of the law is much less rich.

## II. LITIGATION IS IMPORTANT TO THE EVOLUTION OF THE LAW

There was a time during the Reagan era when some of my colleagues jokingly suggested that my antitrust course should be reclassified as legal history.<sup>85</sup> Although the suggestion was made in jest, it made some sense. Antitrust is a singularly illuminating field in which to watch a form of common law at work.<sup>86</sup> This process has succeeded in moving and clarifying the law because of the steady stream of antitrust cases.

Antitrust doctrine provides rich examples of evolution through case law. We noted above that both *Utah Pie* and *Schwinn* were subjected to successful assault by withering criticism. Other examples are provided by nonprice vertical restraints, summary judgment, and the horizontal per se rule.

### A. Nonprice Vertical Restraints

The criticism of *Schwinn*, the opinion that announced a bright line test declaring that once a firm parted with title to a good it could not control the reseller's use and subsequent disposition of the product, had set the stage for *GTE Sylvania* by stimulating a flowering of judicial non-adherence to its policies. Although *Schwinn*'s rule may have sounded neat on paper, in

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<sup>85</sup> See generally Robert Pitofsky, *The Renaissance of Antitrust*, 45 REC. ASS'N B. CITY OF NEW YORK 851 (1990) (commenting on trends in antitrust enforcement); Thomas Krattenmaker & Robert Pitofsky, *Antitrust Merger Policy and the Reagan Administration*, 33 ANTITRUST BULL. 211 (1988) (discussing merger policy and enforcement during the Reagan administration).

<sup>86</sup> Many courts and commentators have interpreted the Sherman Act "as a mandate to develop a common law of antitrust." AREEDA & KAPLOW, *supra* note 62, at 58. For opposition to this view, see Thomas C. Arthur, *Workable Antitrust Law: The Statutory Approach to Antitrust*, 62 TUL. L. REV. 1163, 1163-70, 1224-34 (1988) (positing that antitrust law should be implemented via operational legal standards); Thomas C. Arthur, *Farewell to the Sea of Doubt: Jettisoning the Constitutional Sherman Act*, 74 CAL. L. REV. 263, 263-72 (1986) (arguing that the judiciary's proper role is to construe the antitrust statutes as statutes rather than as an open-ended invitation to make national competition policy).

practice it proved unworkable. Courts were persuaded to undermine the strict rule as they were presented with compelling economic justifications for vertical nonprice restraints. First-sellers were permitted to make recommendations, to require the passing over of profits made outside assigned territories, and to impose best-efforts clauses.<sup>87</sup> The result was a decade of uncertainty and confusion as lower courts distinguished *Schwinn* and applied a rule of reason analysis.<sup>88</sup> Finally, the landmark 1977 opinion, *Continental T.V., Inc. v. GTE Sylvania, Inc.*,<sup>89</sup> recognized the new reality and, rejecting suggestions for a narrow opinion, overruled *Schwinn* and directed a return to the rule of reason analysis that governed nonprice vertical restrictions prior to *Schwinn*.<sup>90</sup> Lower courts no longer had to strain to distinguish *Schwinn* in order to apply the rule of reason.

*GTE Sylvania* stimulated its own uncertainty, to be sure: just how should one balance intra- and inter-brand competitive effects? Litigants responded, and a host of courts weighed in, largely emphasizing inter-brand effects.<sup>91</sup> Litigation-generated discord became the vehicle for evolution to a reasonably well-understood approach to nonprice vertical restraints.<sup>92</sup>

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<sup>87</sup> See, e.g., *Superior Bedding Co. v. Serta Assocs., Inc.*, 353 F. Supp. 1143, 1150-51 (N.D. Ill. 1972) (upholding pass-over fee to compensate for advertising and sales expense of licensee in whose territory sales were made); *United States v. Topco Assocs., Inc.*, 1973-1 Trade Cas. (CCH) ¶ 74,391, at 93,798 (N.D. Ill.) (permitting pass-over arrangements for "reasonable compensation" for goodwill created for product's trademark, provided that they were not used "to achieve or maintain territorial exclusivity").

<sup>88</sup> See ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 26-27 (1977) (citing cases).

<sup>89</sup> 433 U.S. 36 (1977).

<sup>90</sup> *Id.* at 47, 59. The Court found that the distinction drawn between sale and consignment transactions in *Schwinn* had no sound basis with respect to the competitive impact of each restriction. See *id.* at 52-54, 57. The Court recognized both that vertical restrictions can promote interbrand competition by allowing the manufacturer to realize efficiencies in the distribution of its products, see *id.* at 54, and that the interbrand competition confronting a manufacturer can provide a significant check on the exploitation of intrabrand market power. See *id.* at 52 n.19. The Court emphasized that departure from the rule of reason "must be based upon demonstrable economic effect rather than—as in *Schwinn*—upon formalistic line drawing." *Id.* at 59.

<sup>91</sup> See, e.g., 1984 ANTITRUST LAW DEVELOPMENTS, *supra* note 60, at 70-72 (citing scores of cases following the decision in *Sylvania*).

<sup>92</sup> One of the fine chronicles of developments in vertical restraint law is Richard M. Steuer, *The Turning Points in Distribution Law*, 35 ANTITRUST BULL. 467 (1990) (focusing on the application of antitrust law to distribution and marketing by manufacturers).

### B. Summary Judgment

For years, the procedural part of antitrust was typified by *Poller*.<sup>93</sup> Summary judgment (and, by inference, motions to dismiss) were seldom appropriate in antitrust cases, or so it was said.<sup>94</sup> But although the veneer of *Poller*'s words was preserved, the underlying reality changed. As courts perceived that antitrust cases (and potential treble damages) were leading to excesses, they started awarding defendants relatively early wins.<sup>95</sup> When the appropriateness of summary decisions in antitrust was explicitly recognized in *Matsushita*,<sup>96</sup> it was more the confirmation than creation of a new reality. *Matsushita* itself may have been read a little too enthusiastically by some courts,<sup>97</sup> which the Court corrected in *Kodak*.<sup>98</sup>

### C. The Horizontal Per Se Rule

The per se rule against price fixing has been antitrust's cen-

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<sup>93</sup> *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464 (1962).

<sup>94</sup> See *id.* at 473 ("[S]ummary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot.").

<sup>95</sup> See Stephen Calkins, *Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System*, 74 GEO. L.J. 1065, 1127-30, 1137-39 (1986).

<sup>96</sup> *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986) (discussing the requirements for defeating summary judgment motion).

<sup>97</sup> See generally 1997 ANTITRUST LAW DEVELOPMENTS, *supra* note 47, at 828 n.424 (citing cases in which lower courts increasingly dismissed antitrust actions on the ground that plaintiff's claim was not economically plausible or that plaintiff had not adduced evidence that tended to exclude the possibility of independent action); see *id.* at n.426 (citing cases in which lower courts interpreted *Matsushita* as disavowing *Poller*'s admonition to use summary judgment sparingly in antitrust litigation).

<sup>98</sup> *Eastman Kodak Co. v. Image Technical Servs. Inc.*, 504 U.S. 451 (1992). The Court in *Kodak* explained that the "requirement in *Matsushita* that the plaintiffs' claims make economic sense did not introduce a special burden on plaintiffs facing summary judgment in antitrust cases." *Id.* at 468. The Court went on to explain that *Matsushita* articulated the same "reasonable inference" standard that applies to all summary judgment motions. See *id.*

*Kodak* itself serves as a small example of the clarifying effect of repeated litigation. The Supreme Court's opinion, which was far from a model of transparency, was read by some as a minor correction and by others as a potential sea change. A series of lower court decisions have cabined in the opinion and expressed a clear preference for the former interpretation. See, e.g., *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 7 Trade Reg. Rep. (CCH) ¶ 71,909, at 80,432 (3d Cir. 1997) (distinguishing *Kodak*).



tral command. The rule was fashioned in a series of cases<sup>99</sup> and enunciated most enthusiastically in *United States v. Socony-Vacuum Oil Co.*<sup>100</sup> *Socony's* sweeping words were the antitrust rule, until *Broadcast Music* transposed the elements of the equation.<sup>101</sup> Before *Broadcast Music*, it was hornbook law that arrangements affecting prices were "price fixing" and thus automatically illegal.<sup>102</sup> *Broadcast Music* explained that arrangements that beneficially affected prices were lawful and therefore could not be "price fixing."<sup>103</sup>

This seeming invitation to rethink settled rules roiled the antitrust waters until calm was restored though clarifying cases. A lawyer boycott in support of higher prices was condemned per se in *Superior Court Trial Lawyers*.<sup>104</sup> Standardization of credit terms was struck down in *Catalano*.<sup>105</sup> A misguided Eleventh Circuit approval of agreements among competitors and potential competitors to divide territories was rebuffed summarily by the Supreme Court in *Palmer v. BRG*.<sup>106</sup> At the Federal Trade

<sup>99</sup> See, e.g., *United States v. Trenton Potteries Co.*, 273 U.S. 392, 398 (1927) (recalling the development of the per se prohibition against uniform price-fixing); cf. *United States v. Rabinowich*, 238 U.S. 78, 86 (1915) ("A person may be guilty of conspiring although incapable of committing the objective offense."); *Nash v. United States*, 229 U.S. 373, 378 (1913) (indicating that conspiracies under Sherman Act § 1 are not dependent on any overt act for imposing liability).

<sup>100</sup> 310 U.S. 150, 223, 225 n.59 (1940).

A combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity ... is illegal per se .... [A] conspiracy to fix prices violates § 1 of the Act though no overt act is shown, though it is not established that the conspirators had the means available for accomplishment of their objective, and though the conspiracy embraced but a part of the interstate or foreign commerce in the commodity.

*Id.*

<sup>101</sup> *Broadcast Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1 (1979).

<sup>102</sup> Cf., e.g., A.D. NEALE, *THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA* 34 (2d Cir. 1970) ("Price fixing is illegal per se: no evidence of the reasonableness of the prices fixed need be heard by courts or submitted to juries.").

<sup>103</sup> In *Broadcast Music*, 40,000 authors and composers granted nonexclusive rights to the American Society of Composers, Authors, and Publishers and Broadcast Music, Inc. to license their musical compositions for a fee. *Broadcast Music*, 441 U.S. at 5. Licensees (usually radio and television stations) almost always elected to take a blanket license. The Court held that the blanket license should be judged under the rule of reason, because of the procompetitive efficiencies that flowed from "the integration of sales, monitoring, and enforcement against unauthorized copy-right use" and because the blanket license was, in effect, a new product. *Id.* at 20.

<sup>104</sup> *FTC v. Superior Ct. Trial Lawyers Ass'n*, 493 U.S. 411 (1990).

<sup>105</sup> *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980).

<sup>106</sup> *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990).

Commission, the per se rule has been applied to professional association restrictions that prevented price advertising in *California Dental Ass'n*,<sup>107</sup> and restrictions that prevented price competition on virtually all aspects of conference interpretation services in *International Ass'n of Conference Interpreters*.<sup>108</sup> The Ninth Circuit affirmed *California Dental Ass'n* but only on "quick look" rule of reason grounds, and, again, antitrust law evolved through litigation.

### III. LITIGATION IS IMPORTANT FOR CERTAINTY AND PREDICTABILITY

Increasingly, in recent years, commentators have compared United States and European Economic Community ("EEC") anti-trust/competition law.<sup>109</sup> In many respects the two bodies of law are similar. Article 85 of the Treaty of Rome is a rough counterpart to Section 1 of the Sherman Act<sup>110</sup> and Article 86 of Section 2,<sup>111</sup> both the United States and the EEC have merger control

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<sup>107</sup> *California Dental Ass'n*, (No. 9259), reprinted in Trade Reg. Rep. (CCH) ¶ 24,007, *aff'd*, 128 F.3d 720 (1997). The challenged rules, *inter alia*, restricted the advertising of low prices and discounts. The association argued that the restrictions were procompetitive because they were intended to protect consumers from unfair or deceptive advertising. The Commission viewed the restrictions as limiting truthful, non-deceptive price and nonprice advertising, which it considered to be illegal under a truncated rule of reason and, for the limits on price advertising, under the per se rule. The court of appeals affirmed on the first ground. See *California Dental Ass'n*, 128 F.3d at 727-28.

<sup>108</sup> *International Association of Conference Interpreters*, (No. 9270), reprinted in Trade Reg. Rep. (CCH) ¶ 24,235 (Feb. 19, 1997) (upholding many nonprice restrictions under the rule of reason).

<sup>109</sup> One notable collection of articles is 22 J. REPRINTS FOR ANTITRUST L. & ECON. Nos. 1 & 2 (1993), which includes discussions of all of the topics mentioned herein.

<sup>110</sup> Article 85 prohibits agreements, decisions of associations and concerted practices that may affect trade between member states and which have as their objective or effect the prevention, restriction or distortion of competition within the EEC. Treaty Establishing EEC, Mar. 25, 1957, 298 U.N.T.S. 3, Art. 85 [hereinafter Treaty of Rome]. Article 85 lists several examples of restrictive agreements, including price fixing, production or market limitations, market sharing, imposition of discriminatory trading conditions and certain tie-ins. One of the many good published comparisons of Article 85 and the Sherman Act is Valentine Korah, *From Legal Form Toward Economic Efficiency—Article 85(1) of the EEC Treaty in Contrast to U.S. Antitrust*, in THE ANTITRUST IMPULSE ch. 33 (Theodore Kovaleff ed., 1994).

<sup>111</sup> Article 86 prohibits any "abuse ... of a dominant position," including by "directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions," by "limiting production, markets or technical development to the prejudice of customers," or by "applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive dis-

laws.<sup>112</sup> But there are noteworthy differences, too. For example, under EEC law, a firm that charges excessive or unfair prices may violate Article 86's prohibition against abuse of its dominant position.<sup>113</sup> Another difference is that modern U.S. law focuses quite sharply on protecting only competition, whereas EEC law may give greater weight to protecting more diffuse interests.<sup>114</sup>

Some of these differences can be understood only by considering the different enforcement alternatives in the two arenas. In Europe, almost all enforcement is undertaken by government agencies, most typically the European Commission ("EC"). Although much discussion has been given to increasing private enforcement,<sup>115</sup> it still remains the exception. The incentives for

advantage." Treaty of Rome, 298 U.N.T.S. 3, Art. 86.

<sup>112</sup> Under United States' law, the Hart-Scott-Rodino Antitrust Improvements Act of 1976 established premerger notification requirements, including a prescribed waiting period for large mergers. See 15 U.S.C. § 18a (1994). Similarly in the EEC, mergers and acquisitions are subject to regulation under the EEC Merger Regulation or merger control laws of the member states. See Council Regulation (EEC) No. 4064/89, 1989 O.J. (L 395) 1, *corrigendum* 1990 O.J. (L 257) 13. The EEC Merger Regulation also contains mandatory pre-closing notification and waiting period requirements.

<sup>113</sup> See generally BARRY E. HAWK, II, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE 739-48, 872-82 (2d ed. 1996) [hereinafter B. HAWK, A COMPARATIVE GUIDE] (discussing cases in which the EEC Court of Justice has held that excessive prices can constitute an abuse of dominant position).

<sup>114</sup> Case law under Section 2 of the Sherman Act, for example, emphasizes the protection of competition in the marketplace. In contrast, as illustrated by the four examples incorporated into Article 86, EEC law focuses on conduct that affects a dominant firm's customers or the ultimate consumers of its products. See Treaty of Rome, Art. 86(a)-(d); see also B. HAWK, A COMPARATIVE GUIDE, *supra* note 113, at 743 (considerations of fairness and market integration prompt the EEC to characterize certain conduct as an abuse, while the same conduct might be viewed either neutrally or even favorably under the Sherman Act if it resulted in efficiencies).

FTC Chairman Robert Pitofsky discussed the different focus of the two antitrust regimes when he explained why the Boeing-McDonnell Douglas merger was viewed differently on the two sides of the Atlantic:

Many do not appreciate that antitrust authorities in Brussels and in Washington are enforcing two different statutes with modestly different emphases. In Europe, the concern is with mergers that increase the leverage that can be exercised by a dominant firm and the possible impact of the merger on competitors .... In the United States, the emphasis is less on competitors and "competitive leverage," and more on the effect of a merger on future prices.

*Staples and Boeing: What They Say About Merger Enforcement at the FTC, Prepared Remarks of Robert Pitofsky at "Antitrust 1998" (Sept. 23, 1997) (visited Jan. 28, 1998) <<http://www.ftc.gov/speeches/pitofsky/staplesspc.htm>>.*

<sup>115</sup> For example, the EC issued a notice clarifying the application of Articles 85 and 86 by member state national courts. Notice on Cooperation Between National

private enforcement in Europe are strikingly lower than in the U.S.<sup>116</sup> Private enforcement continues to be the statistical backbone of antitrust law in the United States.<sup>117</sup> Indeed, in the U.S., outside of criminal price fixing, government litigation is quite rare.<sup>118</sup> Here, private suits seeking treble damages, sometimes using the vehicle of class actions, represent the bulk of antitrust jurisprudence.

The promise or threat (depending on one's point of view) of private litigation makes United States antitrust law different from EEC law. In Europe, very general, near-hortatory declarations of law can remain in effect for decades without unduly alarming private firms. In a very real sense, "law" is only what is enforced,<sup>119</sup> and the EC, as a near-monopolist enforcer, can adjust the law by invoking broad admonitions only rarely.

This is not true in the United States. Here, uncertainty in

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Courts and the Commission in Applying Articles 85 and 86 of the EEC Treaty, 1993 O.J. (C 39) 5. That notice explained that the EC does not consider there to be a sufficient Community interest in a competition case when the plaintiff is able to secure adequate protection of its rights before the national courts. In addition, this notice suggests that where there is insufficient Community interest, complaints should be handled in principle by national courts or authorities. The Commission seems likely to encourage complainants to resort to these bodies. See *Automec S.r.l. v. E.C. Commission*, Joined Cases T-24/90 & T-28/90 1992 E.C.R. 2223 [1992] 5 C.M.L.R. 431 (Ct. First Instance 1992) (affirming the right of the EC to decline complaints by private parties that raise no significant Community interest and where adequate redress is available at the national level). The Directorate General IV ("DG IV"), the EC's competition department, now rejects such complaints. This policy may lead to a significant increase in the number of private enforcement actions filed in member state national courts. See Barry E. Hawk & Laraine L. Laudati, *Antitrust Federalism in the United States and Decentralization of Competition Law Enforcement in the European Union: A Comparison*, 20 FORDHAM INT'L L.J. 18, 45-46 (1996).

<sup>116</sup> Although private litigants can sue in member state courts alleging violations of EEC law and obtain redress, such private suits are unusual. EEC law does not provide for treble damages (or any monetary damages) and the English Rule applies (loser pays winner's legal costs). See Ian S. Forrester, *Competition Structures for the 21st Century*, FORDHAM CORP. L. INST. 445, 447, 490-91 (1995); *Panel Discussion on EC Competition and Trade Law*, FORDHAM CORP. L. INST. 579, 596 (1995) (Professor Eleanor Fox observed that treble damages in cartel cases would be a strong incentive that would produce a plaintiffs' antitrust bar, which does not currently exist in the EEC). These differences have retarded the development of a private bar willing to bring private enforcement suits.

<sup>117</sup> In 1996, 781 civil antitrust suits were commenced in United States district courts. Only 35 cases—less than five percent—were commenced by the Government. JUDICIAL BUSINESS OF THE UNITED STATES COURTS 136 (Table C-2) (1996).

<sup>118</sup> See *supra* note 4 and accompanying text.

<sup>119</sup> "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." Oliver Wendell Holmes, *Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

the case law is exploited by private plaintiffs. One trembles at the prospect of the litigation that would flow were U.S. courts to announce that high prices are illegal! Indeed, one need only examine the evolution of both summary judgment standards and nonprice vertical restraint law, as previously mentioned,<sup>120</sup> to understand how the perception of excessive private litigation can inspire a drive for certainty and predictability.<sup>121</sup> In the United States, clarity in antitrust law is perceived as a substantial virtue. Antitrust litigation is both a stimulus for and a source of clarity.

#### A. *Illustrations*

The drive for certainty and predictability in U.S. antitrust law can be seen in many different doctrines. The law of nonprice vertical restraints and competitor predatory pricing, which are discussed above, are good examples of litigation as a spur and means to clarity. Litigation has been less common recently, and less effective in achieving certainty and predictability, with respect to two other antitrust doctrines, price discrimination, and resale price maintenance.

*Price Discrimination.* Although the law of competitor predatory pricing has become quite certain and predictable, other price discrimination law is strikingly more muddled. The Robinson-Patman Act<sup>122</sup> used to be a mainstay of antitrust litigation and counseling. The Federal Trade Commission and private litigants brought case after case challenging pricing differences.<sup>123</sup> The good and bad news for private sellers of goods is that litigation has dried up. The last effective government complaint was issued in 1986.<sup>124</sup> Private suits continue, but at a rate far down

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<sup>120</sup> See *supra* notes 87-98 and accompanying text.

<sup>121</sup> The irony, of course, is that the *Schwinn* case that triggered a busy decade of private litigation was a government enforcement case.

<sup>122</sup> 15 U.S.C. § 13(a) (1994).

<sup>123</sup> For example, the FTC issued 758 Robinson-Patman orders between 1960 and 1972. See F. SCHERER & D. ROSS, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 510 (3d ed. 1990).

<sup>124</sup> See *Max Factor & Co.*, 108 F.T.C. 135 (1986) (FTC accepted consent order requiring, *inter alia*, that the manufacturer make its promotional allowances available to all of its customers on proportionally equal terms). Although in 1988 the FTC issued complaints against six of the country's largest book publishers, each alleging Robinson-Patman violations, the agency later dismissed the complaints on public interest grounds. See *Harper & Row, Publishers, Inc.*; *MacMillan, Inc.*; *Hearst Corp.* and *William Morrow and Co.*; *Putnam Berkley Group, Inc.*; *Simon & Schuster, Inc.*;

from the glory years of the Act.<sup>125</sup> The result of this neglect is that Robinson-Patman litigators have little to do; Robinson-Patman advisors have the unenviable task of giving legal advice based on a law that is stringent as written (or at least as interpreted by dated but still possibly effective court precedents) but permissive as enforced by government agencies. Consequently, there is, more likely than not, a wide disparity in the degree of attention to the Act among sellers of goods in this uncertain legal regime.

*Resale Price Maintenance.* The black letter law of resale price maintenance is reasonably clear: a vertical agreement on maximum or minimum resale prices is illegal per se. For a time this was applied with confidence and vigor, subject to a narrow exception. *Colgate* stood for the proposition that “[i]n the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in ... business, freely to exercise his own independent discretion as to parties with whom he will deal.”<sup>126</sup> This was interpreted parsimoniously.<sup>127</sup>

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Random House, Inc., Nos. 9217-9222 (Sept. 10, 1996), 1996 FTC Lexis 425.

<sup>125</sup> Recent litigated Robinson-Patman cases have been brought by private parties. 1997 ANTITRUST LAW DEVELOPMENTS, *supra* note 47, at 430. The Supreme Court's decision in *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), further reduced private litigants' incentive to allege Robinson-Patman violations based on predation by competing sellers. Pre-*Brooke Group* “primary line” cases—i.e., cases in which victims of the alleged predation are defendant's competitors who allege injury to competition at the seller's level—permitted a plaintiff to demonstrate injury to competition either directly through market analysis or, more commonly, by inference from the seller's predatory intent. See 1997 ANTITRUST LAW DEVELOPMENTS, *supra* note 47, at 446. The Court made clear in *Brooke Group*, however, that liability in a primary line predatory pricing case may not be founded solely on evidence of subjective intent. See *Brooke Group*, 509 U.S. at 241. The Court held that a plaintiff who alleges predatory pricing, whether based on the Robinson-Patman Act or Section 2 of the Sherman Act, must make two key demonstrations: (1) that the challenged prices of a competitor were “below an appropriate measure of its ... costs,” and (2) “that the competitor had a reasonable prospect, or, under § 2 of the Sherman Act, a dangerous probability, of recouping its investment in below-cost prices.” *Id.* at 222, 224. An effort to extend the Court's analysis to “secondary line” cases (cases brought by disfavored customers) was rejected in *Chroma Lighting v. GTE Products Corp.*, 111 F.3d 653 (9th Cir.), *cert. denied*, 118 S. Ct. 357 (1997). See generally David Balto, *In Defense of Small Business*, LEGAL TIMES, Oct. 13, 1997, at 23 (defending *Chroma Lighting* and other recent cases).

<sup>126</sup> *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). Under *Colgate*, a manufacturer could announce the prices it wanted its dealers to charge and refuse to sell to dealers who failed to adhere to those prices.

<sup>127</sup> See *United States v. Parke, Davis & Co.*, 362 U.S. 40 (1960); *cf.* PHILLIP

Gradually the foundation supporting the per se ban on resale price maintenance eroded. First, academic research challenged some of the underlying assumptions.<sup>128</sup> Then, when *GTE Sylvania* was decided, the legal system confronted a sharp contrast between two sets of rules: per se illegality for vertical agreements on price; rule-of-reason treatment and de facto per se legality for almost all vertical nonprice agreements.

Private litigants had powerful incentives to characterize challenged restraints as price related (plaintiffs) or nonprice related (defendants). The courts sought a safety-valve and found it in the issue of "agreement," by reinvigorating *Colgate*. If a manufacturer only suggested prices, courts viewed that as not an agreement.<sup>129</sup> Likewise, neither requiring that discounts be passed on<sup>130</sup> nor conditioning cooperative advertising benefits on the dealer's adherence to suggested resale prices constituted an agreement.<sup>131</sup> Even if a manufacturer terminated a firm specifically because it was a discounter, at the request of an unhappy

AREEDA, ANTITRUST ANALYSIS 433, 438 (1967) ("Should *Colgate* be overruled? ... Can you reconcile the logic of *Parke Davis* with the logic of *Colgate*?"); Robert Pitofsky, *Is the Colgate Doctrine Dead? Affirmative of the Debate*, 37 ANTITRUST L.J. 772 (1968).

<sup>128</sup> See Pauline M. Ippolito, *Resale Price Maintenance: Economic Evidence from Litigation*, Bureau of Economics Staff Report, U.S. Federal Trade Commission (1988); see also S. OPPENHEIM, ET AL., *FEDERAL ANTITRUST LAWS* 9 (1977); Robert Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division (Part 2)*, 75 YALE L.J. 373 (1966). But see Cynthia J. Atchison, Comment, *Spray-Rite Service Corp. v. Monsanto Co.: The Justice Department Challenges the Per Se Rule Against Resale Price Maintenance*, 46 U. PITT. L. REV. 171, 187 (1984).

<sup>129</sup> *Monsanto Co. v. Spray-Rite Serv. Co.*, 465 U.S. 752, 763-64 (1984) (lawful for a manufacturer to suggest resale list prices to its distributors); *Winn v. Edna Hibel Corp.*, 858 F.2d 1517, 1520 (11th Cir. 1988) (no agreement if distributors independently decide to observe suggested resale prices); *General Cinema Corp. v. Buena Vista Distrib. Co.*, 681 F.2d 594, 597 (9th Cir. 1982) (same); *Santa Clara Valley Distrib. Co. v. Pabst Brewing Co.*, 556 F.2d 942, 945 (9th Cir. 1977) (same).

<sup>130</sup> *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 735-36 (1988); *Monsanto*, 465 U.S. at 763-64; *Acquaire v. Canada Dry Bottling Co.*, 24 F.3d 401, 409-10 (2d Cir. 1994); *Jack Walters & Sons Corp. v. Morton Bldg., Inc.*, 737 F.2d 698, 706-07 (7th Cir.), cert. denied, 469 U.S. 1018 (1984); *Lewis Serv. Center, Inc. v. Mack Trucks, Inc.*, 714 F.2d 842, 847 (8th Cir. 1983), cert. denied, 467 U.S. 1226 (1984); *AAA Liquors, Inc. v. Joseph E. Seagram & Sons, Inc.*, 705 F.2d 1203, 1206-07 (10th Cir. 1982), cert. denied, 461 U.S. 919 (1983); *Butera v. Sun Oil Co.*, 496 F.2d 434, 436 (1st Cir. 1974); *In re Magnavox Co.*, 113 F.T.C. 255, 263, 269-70 (1990).

<sup>131</sup> *In re Nissan Antitrust Litig.*, 577 F.2d 910, 914-17 (5th Cir. 1978), cert. denied, 439 U.S. 1072 (1979); *Magnavox Co.*, 113 F.T.C. at 263, 269-70; *Advertising Checking Bureau*, 109 F.T.C. 146, 147 (1987). But cf. *United States v. Playmobil U.S.A., Inc.*, 1995-1 Trade Cas. (CCH) ¶ 71,000 (1995) (consent judgment prohibited manufacturer from withholding advertising rebates from discounting dealers).

full-price competitor who issued an ultimatum, a court would not find that as an agreement.<sup>132</sup> What might appear to be an agreement as a matter of common sense was not an agreement in law.<sup>133</sup> A cynic would suggest that this presented the best of all possible worlds for antitrust defendants: resale price maintenance agreements were per se illegal, but if a plaintiff ever successfully proved an agreement, the defeated defendant still had a solid malpractice suit against its antitrust legal advisor.

A dark cloud entered this rosy world (for defendants) when the Federal Trade Commission, under the leadership of then-Chairwoman Janet Steiger, started questioning some resale pricing arrangements and entering some consent orders.<sup>134</sup> The states, too, extracted orders—and theirs, unlike the FTC's, included payments (usually to charities).<sup>135</sup> Over the protests of dissenting Commissioners, FTC orders such as that issued in

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<sup>132</sup> *Business Elecs.*, 485 U.S. at 735-36 (agreement to terminate dealer "is not illegal *per se* unless it includes some agreement on price or price levels"); *A-Abart Elec. Supply v. Emerson Elec. Co.*, 956 F.2d 1399, 1402-03 (7th Cir.), *cert. denied*, 506 U.S. 867 (1992); *Ben Shafall Distrib. Co. v. Mirta de Perales, Inc.*, 791 F. Supp. 1575, 1583 (S.D. Fla. 1992); *Center Video Indus. Co. v. United Media, Inc.*, No. 90-C-6387, 1992 WL 27006 (N.D. Ill. Feb. 10, 1992), *aff'd*, 995 F.2d 735 (7th Cir. 1993).

<sup>133</sup> *Cf., e.g., Jeanery, Inc. v. James Jeans, Inc.*, 849 F.2d 1148, 1150 (9th Cir. 1988) (insufficient evidence to warrant sending case to jury when manufacturer, *inter alia*, suggested a retail price and "made clear ... that any retailer who sold below the suggested resale price would either be terminated ... or would not receive as favorable treatment from the manufacturer as would complying retailers"); *Toys "R" Us, Inc. v. R.H. Macy & Co.*, 728 F. Supp. 230, 232, 235 (S.D.N.Y. 1990) (finding no triable issue of fact where defendant retailer "coerced a manufacturer ... to terminate a rival discounting dealer," and where retailer's agent gave one distributor "permission" to sell a lower quality product line to defendant's discounting competitor, and two distributors, who "were friends[,] ... [and] informed each other of what they were doing *vis a vis* Macy").

<sup>134</sup> See *supra* notes 80-82 and accompanying text.

<sup>135</sup> See generally *Resale Price Fixing—State Enforcement*, 7 Trade Reg. Rep. (CCH) ¶ 50,146, at 49, 114, 115 (May 17, 1995) (multi-state settlement with Reebok and Rockport disbursed money pursuant to alternative distribution procedures as "approved by the Court," permitting states to distribute settlement to a "not-for-profit corporation and/or a charitable organization with express conditions ensuring that the funds be utilized to improve, refurbish, renovate and/or provide athletic facilities, equipment or services"); *Connecticut v. Keds Corp.*, No. 93 Civ. 6718 (S.D.N.Y. 1993); *Maryland ex rel. J. Joseph Curran, Jr. v. Mitsubishi Elec. Am., Inc.*, 1992-1 Trade Cas. (CCH) ¶ 69,743 (D. Md. 1992); *Ohio ex rel. Lee Fisher v. Mitsubishi Elec. Am., Inc.* 1992-1 Trade Cas. (CCH) ¶ 69,744 (D. Md. 1992); *State of New York ex rel. Robert Abrams v. Nintendo of Am., Inc.*, 1991-2 Trade Cas. (CCH) ¶ 69,513 (S.D.N.Y. 1991); *In re Minolta Camera Prods. Antitrust Litig.*, 668 F. Supp. 456 (D. Md. 1987).



*American Cyanamid*,<sup>136</sup> untested by litigation, have created a counter-trend on finding an agreement.

*American Cyanamid*, the recent, previously-mentioned RPM case brought by the FTC, is both an example of the way that the collegial nature of the Commission can highlight the controverted nature of a consent order, and an example of the limitations of consent orders in achieving certainty and predictability. According to the complaint, issued by a 4-1 vote, American Cyanamid ("Am Cy") violated the Federal Trade Commission Act when, (1) "[p]ursuant to ... written agreements," Am Cy "offered to pay [its] dealers substantial rebates on each sale if the dealers sold Am Cy's crop protection chemicals at or above the specified minimum resale prices" (which were equal to the wholesale prices the dealers paid); and (2) "[t]he dealers overwhelmingly accepted Am Cy's offer by selling at or above the specified minimum prices."<sup>137</sup> The Commission's order prohibits Am Cy, for 20 years,<sup>138</sup> from "[c]onditioning the payment of any rebate or other incentive to any dealer, in whole or in part, directly or indirectly, on the resale price."<sup>139</sup> The Commission's "analysis to aid public comment" explains that Am Cy's "conditioning of financial payments on dealers' charging a specified minimum price amounted to the *quid pro quo* of an [illegal] agreement on resale prices."<sup>140</sup> On the other hand, the analysis declares that the order's prohibition of conditioning payments "should [not] be construed to prohibit lawful cooperative advertising programs."<sup>141</sup>

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<sup>136</sup> See *supra* note 81-82 and accompanying text.

<sup>137</sup> *In re American Cyanamid Co.*, Complaint (C-3739) ¶ 5 (visited Jan. 28, 1998) <<http://www.ftc.gov/os/9705/C3739cmp.htm>>.

<sup>138</sup> A Commission policy statement explains that "core provisions" should last 20 years, whereas "supplemental provisions" should last 10.

Core provisions prohibit practices that would be unlawful whether used by parties subject to the order at issue or by other similarly situated persons or entities .... Supplemental provisions are intended to prevent a respondent or defendant from repeating a law violation or to mitigate the effects of prior illegal conduct. Such provisions either prohibit or restrict conduct that would be lawful if engaged in by parties not subject to the order at issue or impose an affirmative obligation not otherwise required by law.

Policy Statement Regarding Duration of Competition and Consumer Protection Orders, 60 Fed. Reg. 42,569, 42,570 nn.1, 2 (1995).

<sup>139</sup> *In re American Cyanamid Co.*, Decision and Order (C-3739), Part II(A) (visited Jan. 12, 1998) <<http://www.ftc.gov/os/9705/C3739d&o.htm>>.

<sup>140</sup> *American Cyanamid Company; Analysis to Aid Public Comment*, (No. 951-0106) (Proposed Consent Agreement, Feb. 11, 1997), 62 Fed. Reg. 6255, 6256 (1997).

<sup>141</sup> *Id.* at 6257.

Three members of the four-Commissioner majority responded to a dissent by Commissioner Starek by emphasizing that Am Cy and its distributors entered into "written agreements" for Am Cy to "pay the dealer to adhere to the manufacturer's specified resale price."<sup>142</sup> Commissioner Starek responded that the "complaint in this case indicates that the Commission is willing—despite the clear warnings of *Colgate* and *Monsanto* to the contrary—to infer the existence of *per se* illegal RPM 'agreements' solely from the dealers' unilateral response to Am Cy's 'offer.'"<sup>143</sup> He warned darkly that "as a result of today's decision, the business community may be left wondering how the Commission can—and whether it will—maintain the functional distinction it currently draws between, on the one hand, rebate-pass-through provisions and cooperative advertising programs ... and, on the other hand, other types of rebate programs that similarly impose restrictive conditions on the buyer."<sup>144</sup> Commissioner Azcuenaga, concurring in the Commission's decision, wrote separately to declare that *her* substantive views were "contained entirely within" the complaint and consent order. Now, two of the three Commissioners who co-authored the three-Commissioner statement have retired from the Commission. Although each of the five Commissioners sought conscientiously to perform his or her assigned responsibilities, the very nature of the consent-agreement process is relatively uncondusive to achieving certainty and predictability.<sup>145</sup>

The greatest pressure to avoid finding an agreement has been in vertical arrangements limiting maximum prices. Although maximum prices can, in theory, harm consumers,<sup>146</sup> the

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<sup>142</sup> American Cyanamid Company; Statement of Chairman Robert Pitofsky and Commissioners Janet D. Steiger and Christine A. Varney, (No. 951-0106) (Proposed Consent Agreement, Feb. 11, 1997), 62 Fed. Reg. 6255, 6257 (1997).

<sup>143</sup> American Cyanamid Company; Dissenting Statement of Commissioner Roscoe B. Starek, III, (No. 951-0106) (Proposed Consent Agreement, Feb. 11, 1997), 62 Fed. Reg. 6255, 6259 n.6 (1997).

<sup>144</sup> *Id.* at 6259.

<sup>145</sup> Similarly, it has been oft-noted that merger review has moved from court litigation to bureaucratic processing. *See, e.g., supra* note 3 and accompanying text. The antitrust agencies have turned to Guidelines in an admirable effort to communicate their views with and without the other agencies. However, standards built solely on guidelines and consents are something like a house built on sand: it may look lovely and work splendidly, but it does not carry with it the reassurance that it will not be undone by some stiff challenge.

<sup>146</sup> *See* Ippolito, *supra* note 128, at 6-23. The economic literature identifies a variety of rationales for imposing vertical restraints, but finds only some to be anti-

likelihood of such harm seems remote as a matter of both economics and common sense. Some of the cases that have stretched the furthest to avoid finding an agreement have been in the context of maximum price arrangements.<sup>147</sup> Now, happily, private litigation has provided a vehicle for resolving whether maximum RPM is per se illegal.<sup>148</sup> The federal antitrust agencies have weighed in on the issue, arguing for rule-of-reason treatment for maximum price controls.<sup>149</sup> This observer hopes that the Court will agree and remove this most extreme incentive to avoid finding an agreement.<sup>150</sup>

### B. *Benefits of Certainty and Predictability*

When the drive for certainty and predictability succeeds, the legal system enjoys certain benefits, albeit with a loss of the fine-tuning that can flow from application of more general admonitions. Market participants obviously benefit from the ability to plan their actions with confidence about likely legal consequences. Two less direct benefits also are important: facilitating private antitrust enforcement and insulating government enforcement.

#### 1. Facilitating private enforcement

When rules are clear anyone can enforce them, including private parties. The availability of private enforcement allows all types of private firms, large and small alike, to have their day in court. The private right of action is preserved because the drive for certainty and predictability helps prevent it from being abused.

Although the small firm may be the prototypical antitrust plaintiff, large firms also can benefit, as antitrust plaintiffs, from

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competitive, primarily by facilitating collusive pricing by suppliers or resellers. *See id.*

<sup>147</sup> *See supra* note 133 and accompanying text.

<sup>148</sup> *See State Oil Co. v. Khan*, 93 F.3d 1358 (7th Cir. 1996), *vacated*, 118 S. Ct. 275 (1997).

<sup>149</sup> Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Reversal, *State Oil Co. v. Khan*, 118 S. Ct. 275 (1997) (No. 96871). In the interests of full disclosure it should be noted that the author's name is on that brief.

<sup>150</sup> Since Professor Calkins delivered this speech, the Supreme Court has rejected the per se illegality of vertical maximum price fixing (announced in *Albrecht v. Herald Co.*, 390 U.S. 145 (1968)), in favor of a return to the rule of reason approach advocated by Professor Calkins. *See State Oil*, 118 S. Ct. at 279, 283.

clear rules. For instance, in tiny Vicksburg, Mississippi, which has two hospitals and several physician clinics, a proposed merger that was structured to align the two largest clinics with one of the town's hospitals was questioned by the disfavored hospital. The disfavored hospital challenged the suspect affiliation and had its day in court to argue that the prevailing merger standards made the proposed merger illegal. No one suggested that there was anything inappropriate about merger standards being invoked by a hospital that was part of the largest for-profit hospital chain in the country, Columbia-HCA ("Columbia"). Columbia lost before the district court (the case is on appeal), but it had an opportunity to be heard.<sup>151</sup> Antitrust litigation can play an important role by providing a safety-valve for such disputes.<sup>152</sup>

## 2. Insulating government enforcement

Clear rules, and the safety-valve of private litigation, help to insulate government enforcement, as well. The response, "We are law enforcers, enforcing laws that Congress wrote," is a powerful shield to outside pressure.<sup>153</sup>

The EC has a less powerful shield, at least with respect to

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<sup>151</sup> See *HTI Health Servs., Inc. v. Quorum Health Group, Inc.*, 960 F. Supp. 1104 (S.D. Miss.), *injunction denied, appeal dismissed*, 1997 U.S. Dist. LEXIS 5234 (S.D. Miss. Mar. 27, 1997).

<sup>152</sup> Although some antitrust predictability is essential to the existence of private enforcement, merger law, which has become something of a regulatory specialty, has moved away from bright lines. Although this greater sensitivity can improve particular decisions, it also permits courts to reason, as this one did, that the lessening of competition between two clinics is beneficial because it "will foster cooperative, rather than divisive, efforts among the doctors" with respect to recruitment of specialists and issuance of certificates of need for specialized equipment. *Id.* at 1143.

<sup>153</sup> This view is most closely associated with former AAG Thomas E. Kauper. See Thomas E. Kauper, *The Justice Department and the Antitrust Laws: Law Enforcer or Regulator?*, 35 ANTITRUST BULL. 83, 114-15 (1990) [hereinafter Kauper, *Law Enforcer or Regulator*]; see also Thomas E. Kauper, *Politics and the Justice Department: A View from the Trenches*, 9 J.L. & POL. 257, 258 (1993) [hereinafter Kauper, *View from the Trenches*]; Thomas E. Kauper, *The Role of Economic Analysis in the Antitrust Division Before and After the Establishment of the Economic Policy Office: A Lawyer's View*, 29 ANTITRUST BULL. 111, 130-32 (1984); Thomas E. Kauper, *Competition Policy and the Institutions of Antitrust*, 23 S.D. L. REV. 1, 5-6 (1978). Professor Kauper has worried that "[t]he public is now more dependent on the Division's own judgments, and upon its willingness to keep the exercise of its discretion within the bounds of legislative intention and established doctrine." Kauper, *Law Enforcer or Regulator*, *supra*, at 117. He has wondered in print whether the increasingly regulatory nature of government antitrust enforcement might not call for transfer of the Division's civil antitrust responsibility to the more institutionally regulatory FTC. See *id.* at 121-22.

press criticism, precisely because it has considerably more latitude in its prosecutorial discretion.<sup>154</sup> Commentators have periodically suggested that political considerations played a role in one decision or another by the EC. Most recently, the EC expressed serious concerns about the proposed Boeing Company acquisition of McDonnell Douglas Corporation, particularly because of the merger's potential effect on Europe's Airbus Industrie consortium, Boeing's primary rival in the global market for commercial aircraft manufacturing.<sup>155</sup> Only after the EC leveled threats that it would impose billions of dollars in fines did Boeing offer several key concessions—including termination of Boeing's long-term exclusive contracts with U.S. air carriers—in order to gain EC approval.<sup>156</sup> EC approval came only after vigorous lobbying by the U.S. government.<sup>157</sup> To the end, the EC was plagued by charges of protectionism (which it denied).<sup>158</sup>

In the United States, in contrast, there has been a general impression that politics plays relatively little role in antitrust enforcement. This difference is attributed, at least in part, to the institutional differences in the way antitrust law enforcers in

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<sup>154</sup> Institutional differences between the U.S. and EEC partially explain the latter's greater willingness to introduce social and political values directly into the antitrust analysis. Because the EC is the executive arm of the EEC, social and political values in the EEC play a larger role in antitrust policy in that forum. In this country, the Department of Justice comprises only one part of the executive branch. Various economic, social, and political policies and constituencies are under the direction of other executive departments and agencies. In contrast, the EC is the executive arm of the EEC and has responsibility over all policies and constituencies. This broader mandate necessarily involves the EC in social and political issues and policies. See generally B. HAWK, A COMPARATIVE GUIDE, *supra* note 113, ch. 7.

<sup>155</sup> See Bruce Clark, *Brussels Averts Crisis by Agreeing Boeing Merger*, FIN. TIMES, July 24, 1997, at A-24 (reporting EC's approval of Boeing/McDonnell Douglas merger, ending five months of disagreement which was reported to have threatened a trade war); Jeff Cole, et al., *Boeing Deal Close to European Approval*, WALL ST. J., July 23, 1997, at A-3; Steven Pearlstein, *Boeing Yields to Key EU Demand to Win Approval of McDonnell Deal*, WASH. POST, July 23, 1997, at D-10. Despite FTC clearance for the deal, the EC continued to express concern about the transaction for nearly an additional month. See John R. Wilke & Jeff Cole, *Boeing, McDonnell Douglas Deal Gains U.S. Antitrust Clearance*, WALL ST. J., July 2, 1997, at B-4; Nancy Dunne & Emma Tucker, *Boeing and McDonnell Merger Approved By US Regulators*, FIN. TIMES, July 2, 1997, at A-28.

<sup>156</sup> See Dunne & Tucker, *supra* note 155, at A-28.

<sup>157</sup> See Edmund L. Andrews, *Boeing Concession Averts Trade War With Europe*, N.Y. TIMES, July 24, 1997, at A-1 (speculating on other factors attributable to the EC's approval); Jeff Cole, et al., *Boeing-McDonnell Merger Clears Hurdle*, WALL ST. J., July 24, 1997, at A-2 (same).

<sup>158</sup> See, e.g., Andrews, *supra* note 157, at A-1.

the two arenas are structured. Unlike the EC, which is the executive branch of the EEC and has sole responsibility for competition policy and enforcement, the U.S. Antitrust Division and the FTC are usually considered to be more insulated from political influences.<sup>159</sup>

The public perception of U.S. antitrust enforcement independence may have become less robust as the agencies have been increasingly seen as regulators.<sup>160</sup> For instance, the Consumer Project on Technology has used a web site and e-mail publicly to lobby the agencies on specific matters and to permit easier citizen submission of enforcement views.<sup>161</sup> Both the Antitrust Division and the Commission now accept consumer complaints via e-mail.<sup>162</sup> During the Commission's investigation of the proposed

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<sup>159</sup> See *supra* note 153 and accompanying text; see also e.g., Kauper, *View From the Trenches*, *supra* note 153, at 257 (distinguishing between executive oversight of policies and intervention in particular cases). But cf. William F. Shughart II & Robert D. Tollison, *The Positive Economics of Antitrust Policy: A Review Article*, INTERNATIONAL REVIEW OF LAW AND ECONOMICS 5 (1985), 39-57 (antitrust is shaped by the forces of interest-group politics); THE CAUSES AND CONSEQUENCES OF ANTITRUST: THE PUBLIC CHOICE PERSPECTIVE (Fred S. McChesney & William F. Shughart II, eds. 1995) (advocating a public-choice perspective on antitrust enforcement); WILLIAM F. SHUGHART II, ANTITRUST POLICY AND INTEREST-GROUP POLITICS 36 (1990).

Each of the two antitrust agencies are subject to separate influences. The Antitrust Division is part of the executive branch, so the Assistant Attorney General for Antitrust reports to the Attorney General and, indirectly, to the President. The Federal Trade Commission enjoys the independence from direct executive control associated with its special status, but it may be correspondingly more prone to Congressional influence and interference. See, e.g., AMERICAN BAR ASS'N COMM'N TO STUDY THE FEDERAL TRADE COMMISSION, REPORT 98 (1969) (reporting the separate statement of Richard A. Posner). The agency is supposed to respond to proper Congressional oversight, but ensuring that oversight is proper is no easy task. See *Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission*, 58 ANTITRUST L.J. 43, 107-12 (1989).

<sup>160</sup> See First, *supra* note 3, at 12 (expressing concern about "bureaucratic enforcement").

<sup>161</sup> See Letter from James Love, et al., to FTC Chairman Robert Pitofsky, et al., "Using The Internet To Enhance Public Participation In Merger Reviews" (Mar. 5, 1997) (on file with author) (calling on the Commission "to raise the curtain of secrecy which shrouds the FTC's merger review process," because "the FTC is influenced too much by a handful of large firms who can afford high priced antitrust counsel and experts, and too little by the persons who are most often adversely impacted by the mergers - consumers and small businesses"); E-mail from James Love to internet mailing list "Who to Contact on Boeing/McDonnell Douglas Merger" (Apr. 28, 1997) (on file with author) (supplying voice and fax numbers and e-mail addresses).

<sup>162</sup> Competition complaints are received by the FTC at antitrust@ftc.gov, and by

Staples-Office Depot merger, for a time, the Commission included a special "hot link" on its Home Page for receipt of comments about that proposed transaction—and the agency received literally thousands of e-mail comments.<sup>163</sup> Although I am personally confident that everyone involved in the agency review made decisions solely on the merits e-mail traffic to the Consumer Project on Technology suggested that some observers thought that consumerist pressure was effective.<sup>164</sup>

There also have been some striking recent efforts to turn to Capitol Hill in an attempt to influence antitrust outcomes. For example, the Butterworth-Blodgett Hospital defendants went directly to Congressional budget authorities in an effort to win on the Hill what they were uncertain of winning at the agency.<sup>165</sup> Also, when Anne Bingaman resigned as head of the Antitrust Division, the confirmation of her successor was the subject of rather matter-specific political debate. Joel Klein was confirmed only after considerable Congressional wrangling about telecommunications enforcement actions Klein had taken as acting AAG.<sup>166</sup>

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the Antitrust Division at [newcase@usdoj.gov](mailto:newcase@usdoj.gov) or [antitrust@usdoj.gov](mailto:antitrust@usdoj.gov).

<sup>163</sup> See Yahoo - *FTC Opens Staples Case to Internet Comment*, <[http://www.yahoo.com/headlines/970314/business/stories/staples\\_.html](http://www.yahoo.com/headlines/970314/business/stories/staples_.html)> (quoting James Love, of the Center for the Study of Responsive Law, as responding, "[a]wesome .... I believe[] this is the first time the FTC has ever used the Internet to seek consumer comments on a merger"); see also E-mail from James Love to internet mailing lists Statement by Ralph Nader DOJ's Microsoft Action (Oct. 20, 1997) (on file with author) ("The Consumer Project on Technology recently circulated a letter about the browser issue on the Internet .... Over 1,500 computer users and high tech businesses urged the Department of Justice to take steps that could prevent Microsoft from using anticompetitive practices to monopolize the Browser market ....").

<sup>164</sup> Cf., e.g., E-mail from Audrie Krause to internet list (Oct. 20, 1997) (on file with author) (describing the Justice Department's announcement of its lawsuit against Microsoft as "a sign that consumer pressure is having an impact").

<sup>165</sup> See *Senate Judiciary Panel Members Oppose Rider on FTC Review of Hospital Merger*, 73 Antitrust & Trade Reg. Rep. (BNA) 307 (Sept. 25, 1997) (proposed rider to appropriations bill).

<sup>166</sup> See *Senate Confirms Klein to Run Antitrust Division*, 73 Antitrust & Trade Reg. Rep. (BNA) 69, 69 (July 17, 1997) (noting that various Senators placed holds on the nomination because of Klein's "views and actions as Acting Chief of the Division"). There also are reports of efforts to use politicians to influence the consumer protection activities of the FTC. See *FTC Is Backing Off Bid to Ease Standards for 'Made in U.S.A.'*, WALL ST. J., Oct. 17, 1997, at B-5 (reporting that the FTC would revise the proposal that had "drawn sharp criticism from lawmakers and labor unions"). The press reported that the Commission's complaint against R.J. Reynolds Tobacco Co. was stimulated, in part, by Congressional urging. See WALL ST. J., May 29, 1997, at B-1 (reporting that the agency received bipartisan petitions from 67 House members and 7 senators). The Commission had voted, 3-2, to issue an admin-

One worries about whether the increasing perception of the antitrust agencies as regulators may already be eroding the strength of their protection from political pressure. My personal view is that pressure of any sort has historically been unproductive at the agencies; my personal hope and belief is that it will continue to be unproductive. To the extent that the agencies become regulators rather than litigators, however, pressure (and calls for political accountability) are sure to increase.

#### IV. CONCLUSION

As discussed above, antitrust litigation is important for many reasons, including because some decisions are wrong, because of the importance of litigation to the evolution of the law, and because of the importance of certainty and predictability. That litigation is important does not mean that any particular case should be tried; when government enforcers can achieve full relief without litigation they cannot very well proceed to trial, and, even short of achieving full relief, the potential costs and benefits of litigation may make settlement the obvious choice.<sup>167</sup> Nonetheless, appreciating the importance of litigation may affect decisions, for two reasons.

First, the benefits that can flow from litigation should be regarded as a kind of externality that the government properly should take into consideration. A case may yield benefits not just with respect to the conduct and parties at issue, but also with respect to other conduct and other market participants, and even with respect to the legal system itself. A government agency totting up costs and benefits should consider these "external" benefits as part of its calculus.

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istrative complaint against the tobacco giant, challenging the company's "Joe Camel" advertising campaign. The agency alleged that the ad campaign is an "unfair practice" under Section 5 of the FTC Act, 15 U.S.C. § 45. *See generally* John M. Broder, *FTC Charges Joe Camel Ad Illegally Takes Aim at Minors*, N.Y. TIMES, May 29, 1997, at A-1 (quoting company executive's belief that "cold chill of potential regulation" will affect other industries, as well); Bruce Ingersoll, *Joe Camel Ads Illegally Target Kids, FTC Says*, WALL ST. J., May 29, 1997, at B-1 (discussing regulatory assaults on tobacco company and Clinton administration's commitment to stop those who glamorize tobacco products in a manner that influences children).

<sup>167</sup> The FTC's most recent attempt to engage in antitrust litigation was foiled when parties to a planned merger abandoned the transaction the morning the hearing was to begin. *See Medical Equipment Supplier Shuts Off Merger Plan in Light of FTC Challenge*, 73 Antitrust & Trade Reg. Rep. (BNA) 310, 310-11 (Sept. 25, 1997).



Second, an adjudicative agency such as the FTC should strive to make administrative adjudication an effective alternative to settlement. It is important that respondents know that they may decline to settle a matter and test the agency's allegations in an efficient, cost-effective, and fair proceeding. Similarly, it is important that agency staff know that meritorious claims can be tested through expeditious adjudication, so staff are free in fact to decline to accept inadequate settlements.

In part because litigation is so important, the FTC recently took steps to make administrative litigation operate more smoothly and expeditiously at the agency. Last fall, the Commission announced sweeping amendments to the rules of practice that govern its adjudicative docket. These amendments established tighter deadlines,<sup>168</sup> attempted to minimize unnecessary discovery delays<sup>169</sup> and delays at trial,<sup>170</sup> and created a new "fast track"<sup>171</sup> procedure that will allow those respondents

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<sup>168</sup> For example, the Administrative Law Judge ("ALJ") must now issue his decision within one year after service of the administrative complaint. *See* Initial Decision, 61 Fed. Reg. 50,640, 50,650 (1996) (codified at 16 C.F.R. § 3.51(a)). In addition, the amended rules impose tighter interim deadlines during early phases of the proceeding. *See* Answer to Complaint, 61 Fed. Reg. 50,640, 50,646 (1996) (codified at 16 C.F.R. § 3.12(a)) (requiring that an answer must be filed within 20, rather than 30 days following service of the administrative complaint); Prehearing Procedures, 61 Fed. Reg. 50,640, 50,646 (1996) (codified at 16 C.F.R. § 3.21) (requiring that a scheduling conference between the ALJ and the litigants be held within 7 days after the filing of the answer and the ALJ's scheduling order be issued within 2 days thereafter).

<sup>169</sup> Under the modified rules, the parties must make certain initial disclosures within five days after the filing of the answer, without awaiting a formal discovery request from the other party. This initial joint disclosure requirement parallels Rule 26(a) in the Federal Rules of Civil Procedure. Also, as in federal court, discovery requests no longer must be preapproved. The amended rules also encourage greater use of prehearing and status conferences, and require consultation between the parties before the mandatory scheduling conference. In addition, each party is now limited to 25 interrogatories, consistent with federal court practice. *See* Fed. R. Civ. P. 33.

<sup>170</sup> To minimize unnecessary delays at trial, the ALJ is now required to hold a final prehearing conference at which counsel are to submit proposed stipulations of law, fact, or admissibility of evidence; exchange exhibit and witness lists; and designate testimony to be presented by deposition. Although not explicitly included in the rule amendments, the Commission included in its statement accompanying the amendments a suggestion that the ALJs also consider other techniques for expediting administrative trials. For example, ALJs are encouraged to allow parties to submit direct examination of expert witnesses in writing, in lieu of live direct examination (reserving live testimony for cross-examination). *See* Techniques for Expediting Evidentiary Hearings, 61 Fed. Reg. 50,640, 50,641 (1996).

<sup>171</sup> The new fast track schedule is made available to respondents in certain ad-

who elect this expedited schedule to have their cases fully resolved by the Commission within thirteen months. All of these changes are designed to make litigation a more viable option at the FTC.

That litigation is a viable option helps both complaint counsel and respondents alike, because neither needs to contemplate an unjustified settlement simply to avoid a litigation swamp.<sup>172</sup> It also helps in the development of certain and predictable anti-trust standards and enforcement.

I like to think that Lewis Bernstein would have approved.

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ministrative proceedings where a federal district court has granted the agency's request for a preliminary injunction in a collateral federal court proceeding. See *Fast Track Proceedings*, 61 Fed. Reg. 50,640, 50,645 (1996) (codified at 16 C.F.R. § 3.11A).

<sup>172</sup> The streamlined procedures for administrative litigation may also lead to more rapid settlements. For example, in September 1996, the Commission filed an administrative complaint against Exxon, challenging the company's advertising campaign that cars would run better on higher-octane gasoline. Within roughly nine months, the FTC had reached a negotiated settlement with the respondent, taking the case out of the agency's administrative docket. See generally *Exxon Corp., Analysis to Aid Public Comment* (No. 9281) (Proposed Consent Agreement, June 18, 1997), 62 Fed. Reg. 35816 (1997); *Exxon, FTC Reach Settlement on Ads for High-Octane Gas*, WALL ST. J., June 25, 1997, at A-6; David Segal, *Taming the Octane of the Ads, Exxon Agrees to TV Spots to Soften Gasoline Claims*, WASH. POST, June 25, 1997, at C-11; see also *Quaker State Corp., Analysis to Aid Public Comment* (No. 9280) (Proposed Consent Agreement, July 17, 1997), 62 Fed. Reg. 40530 (1997); Troy Flint, *Slick 50 Maker Settles with FTC*, CLEVELAND PLAIN DEALER, July 24, 1997, at 1C (proposed consent agreement with Quaker State issued about one year after administrative complaint issued by the FTC).

